Supreme Court, U.S.
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92-708

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SELOX, INC., A Corporation,
Petitioner,

vs.

THOMAS A. J. FAUSEK, *et al.*,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 21, 1992

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QUESTIONS PRESENTED FOR REVIEW

1. Should the "good cause" exception to corporate attorney-client privilege announced in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied* 401 U.S. 974, 28 L.Ed.2d 323, 91 S.Ct. 1191 (1971) be limited to shareholder derivative actions as later held by the Ninth Circuit in *Weil v. Investment/Indicators Research & Management*, 647 F.2d 18 (9th Cir. 1981)?

2. If the *Garner* "good cause" exception to corporate attorney-client privilege is not limited to shareholder derivative actions, should it be limited to actions between shareholders and the corporation which challenge matters of general corporate governance (quasi-derivative actions) involving a fiduciary relationship between corporate management and shareholders relative to the subject matter of the litigation as subsequently suggested by the Fifth Circuit in *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988)?

3. If the *Garner* "good cause" exception to corporate attorney-client privilege is not limited to derivative or at least quasi-derivative actions, should the courts require that a fiduciary relationship exist between plaintiffs and the corporation relative to the subject matter of the litigation before beginning the good cause analysis as to whether the corporation's attorney-client privilege is to be breached?

PARTIES TO THE PROCEEDINGS BELOW

Appellant was Selox, Inc.

Plaintiffs-Appellees were: Thomas A. J. Fausek; William F. Fausek; Jeanne S. Fausek as Executrix of the Will of Irwing F. Fausek, Jr. Deceased; James F. Fausek as Co-Trustee Under the Irwing F. Fausek, Sr. Trust; James F. Fausek and Geneva L. Fausek, as Trustees f/b/o James F. Fausek; Janice R. White, Executrix of the Will of James A. White, Deceased; Oma Lee McKamey; Al V. Fausek; Maynard and Camilla Rinehart; Jean L. Carter; 1st Interstate Bank of Arizona, N.A., Trustee for Miriam Y. Weidner; Armin M. Elbert and Ruth C. Elbert as Trustees of the Elbert Family Trust; Mark A. Elbert; Charles A. Elbert; Nancy J. Elbert; Steven J. Elbert; and Rosalie C. Elbert; Winona National and Saving Bank, Executor of the Will of Robert E. Maxwell.

Defendants in the district court who did not participate in the proceedings in the Court of Appeals but who are Respondents in this Court are: Robert E. White; James B. Frost and Company, a partnership comprised of James B. Frost, Carl W. Henderson, James D. Hutcherson, E. Larry Walker and E. Ladell McCullough; James B. Frost; Carl W. Henderson; James D. Hutcherson; E. Larry Walker; E. Ladell McCullough; and Thomas H. Lowe.

Pursuant to Sup. Ct. Rules 14.1(b) and 29.1, Petitioner states that it is a wholly owned subsidiary of The BOC Group, Inc., a Delaware corporation, which is a wholly owned subsidiary of BOC, Inc., a Delaware corporation, which is a wholly owned subsidiary of The BOC Group, Inc., a Nevada corporation, which is a wholly owned subsidiary of The BOC

Group plc, a publicly owned corporation of the United Kingdom.

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SELOX, INC., A Corporation,

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THOMAS A. J. FAUSEK, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Selox, Inc., prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered June 5, 1992, the Court of Appeals having subsequently denied Petitioner's motion for rehearing and suggestion for rehearing in banc on July 23, 1992.

OPINIONS BELOW

The following opinions and orders of the lower courts are included in the Appendix to the Petition:

1. Opinion of the United States Court of Appeals for the Sixth Circuit rendered June 5, 1992 (reported at 965 F.2d 126 (6th Cir. 1992)).

2. Judgment of the United States Court of Appeals for the Sixth Circuit rendered June 5, 1992 and issued as Mandate on August 18, 1992 (not reported).

3. Order of the United States Court of Appeals for the Sixth Circuit rendered July 23, 1992 (not reported).

4. Order of the United States Magistrate Judge for the Eastern District of Tennessee rendered October 19, 1990 (not reported).

5. Order of the United States District Court for the Eastern District of Tennessee, Southern Division, Thomas G. Hull, by Interchange, rendered August 19, 1991 (not reported).

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on June 5, 1992. Petitioner's timely petition for rehearing and suggestion for rehearing in banc was denied by an order of the Court of Appeals entered July 23, 1992. Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred on this Court by 28 U.S.C. §1254(1).

RULES INVOLVED

Rule 501, Federal Rules of Evidence, provides as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision

> thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

STATEMENT OF THE CASE

This case originated with the filing of ten separate lawsuits in the United States District Court for the Eastern District of Tennessee at Chattanooga in 1989 by former shareholders of Selox, Inc. ("Selox"). These shareholders sued Robert E. White, the chief executive officer and alleged controlling shareholder of Selox, Thomas H. Lowe, at one time chief financial officer of Selox, the outside accountants of Selox and one outside director who is no longer a party to the litigation. Plaintiffs, all of whom are respondents to this Petition, complained that they sold their stock in a series of individual transactions between 1982 and 1987 either to Robert E. White or to Selox for substantially less than the amount they would have received had they held on to their stock until March, 1988, when Selox was acquired by The BOC Group, Inc.

All of the lawsuits included claims brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, *et seq.* and the Securities Exchange Act, 15 U.S.C. §78a, *et seq.* Orig-

inal jurisdiction in the district court was based upon 28 U.S.C. §1331. The plaintiffs also invoked the pendent jurisdiction of the district court with respect to additional claims brought under the Tennessee Securities Act, T.C.A. §48-2-122, and claims of common law fraud and deceit, negligent misrepresentation, breach of contract and breach of Robert E. White's alleged fiduciary duties to the plaintiffs as a controlling shareholder. Selox was not named as a defendant in any of these ten cases, all of which were eventually consolidated by order of the district court.

In June, 1990, plaintiffs served a deposition subpoena *duces tecum* on Attorney Joel E. Richardson, a partner in the Chattanooga law firm of Miller & Martin ("Richardson"), compelling him to testify at a deposition and to produce various documents from the files of his law firm. (App. 30a) Miller & Martin had been legal counsel to Selox and to Robert E. White from 1984 through the consummation of the sale of the company to The BOC Group, Inc. in March, 1988. At the time of the issuance of the subpoena, Miller & Martin was defense counsel for Robert E. White in the ten consolidated cases but no longer represented Selox.

Plaintiffs did not serve a copy of the deposition notice or subpoena upon Selox. Consequently, Selox did not learn of the deposition until Miller & Martin notified Selox thereof approximately five days before the deposition was scheduled. Counsel for Selox then notified Miller & Martin and specifically attorney Richardson that Selox would not waive its attorney-client privilege with respect to the deposition.

Counsel for Selox attended the deposition at which time various documents not relevant to the issues now

before the Court were produced by Attorney Richardson. Disputes arose between counsel for plaintiffs and counsel for defendant White over the intended scope of the attorney's files sought by the subpoena *duces tecum*. These disputes were not resolved or addressed by plaintiffs in their motion to compel. Consequently, the only documents put at issue by the motion to compel were those previously listed as withheld from production from the files of defendant White on a listing made exhibit 456 to the deposition. (App. 42a).

Complying with Selox's request, attorney Richardson refused to answer a series of questions on the basis of Selox's attorney-client privilege. Thereafter, plaintiffs filed a motion to compel answers to these questions. (App. 35a). Plaintiffs' motion purported to cover three areas in which they sought to compel the lawyer's testimony over the assertion of Selox's attorney-client privilege: (1) legal advice to defendant White in the acquisition of stock from minority shareholders in the form of treasury stock; (2) legal advice to defendant White regarding the acquisition of Selox stock by him from other minority shareholders of Selox; and (3) legal advice to defendant White in regard to stock previously purchased by him from certain plaintiffs.

Plaintiffs' motion was referred to United States Magistrate Judge Joe A. Tilson for decision pursuant to standing orders of the district court and 28 U.S.C. §636(a). Selox opposed the motion to compel and appeared and participated through counsel at oral argument of the motion. There was no evidentiary hearing.

On October 19, 1990, the Magistrate Judge issued an order granting the motion to compel. On November 5, 1990, Selox filed and served its Objections and Appeal from the order, as did defendant White.

The Objections and Appeal of Selox and defendant White were briefed and then taken under advisement by United States District Judge Thomas G. Hull, who entered an order on August 19, 1991, adopting and affirming the order of the Magistrate Judge without further elaboration under Rule 72(a), *F.R.Civ.P.* (App. 28a).

Selox then appealed to the United States Court of Appeals for the Sixth Circuit and also obtained a stay of the deposition pending appeal. Jurisdiction of the Court of Appeals was grounded on 28 U.S.C. §1291 and the "collateral order doctrine." The Court of Appeals ordered that the appeal be handled on an expedited basis. The Court of Appeals affirmed the orders of the United States Magistrate Judge and the District Judge in an opinion issued on June 5, 1992. Thereafter, Selox filed a timely motion to rehear with suggestion for rehearing inbanc, which was denied by an order of the Court of Appeals entered on July 23, 1992.

In February and March, 1992, while Selox's appeal was pending in the Court of Appeals, two new actions were filed in the United States District Court for the Eastern District of Tennessee at Chattanooga naming Selox as the sole defendant. The first of these actions was brought by all of the individual plaintiffs other than the Elbert family, and the second was brought by the Winona National and Savings Bank as Executor of the Robert Maxwell estate. These actions assert claims under the Racketeer Influenced and Cor-

rupt Organizations Act ("RICO"), 18 U.S.C. §1961, and various state common law claims for fraud and misrepresentation. These two new cases have been consolidated with the ten original cases over the objection of Selox and Robert E. White, one of the defendants in the ten original cases.

The motion to compel, the order of the United States Magistrate Judge, and the opinion of the Court of Appeals all were premised upon the opinion of the United States Court of Appeals for the Fifth Circuit in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 28 L.Ed.2d 323, 91 S.Ct. 1191 (1971) ("*Garner*"). The *Garner* decision established the right of shareholders or former shareholders in litigation with their corporation to attempt to establish a "good cause" exception to the assertion of attorney-client privilege by the corporation or its management.

Petitioner respectfully submits that the Sixth Circuit erred in its application of *Garner* to this case in several respects.

First, while purportedly relying also on a subsequent decision of the Fifth Circuit in *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988), the Court of Appeals extended the *Garner* "good cause" exception far beyond the contexts in which the Fifth Circuit had suggested it might apply in *Ward*, namely a shareholder's derivative action or an action in the nature of a derivative action (a "quasi-derivative" action) challenging a matter of general corporate governance for the benefit of the corporation and all of its shareholders. (In *Ward*, the Fifth Circuit actually reversed orders compelling the corporation's attorney to testify over a claim of privilege.) Moreover, the

Sixth Circuit specifically rejected the position of the Ninth Circuit in *Weil v. Investors/Indicators Research & Management*, 647 F.2d 18 (9th Cir. 1981) that the application of *Garner* should be limited to derivative actions.

Secondly, the Sixth Circuit effectively reversed the burdens of those seeking discovery of privileged information from the corporation's attorney with those asserting the privilege, making the right to assert the attorney-client privilege the exception rather than the rule which the shareholders could then overcome by a balancing of the factors set forth in the *Garner* case.

Finally, the Sixth Circuit inappropriately adopted a single standard from the *Garner* list of criteria, the nonavailability of the information from other sources, as sufficient to establish good cause for breaching the attorney-client privilege and, in the process, also declared the existence of fiduciary duties for Tennessee corporations and their management vis-a-vis the purchase and sale of the stock of minority shareholders in clear contradiction to the decided law of the State of Tennessee.

This case presented issues of first impression in the Sixth Circuit, whose opinion far exceeds the decisions of the Fifth Circuit in the application of the *Garner* good cause exception to attorney-client privilege, and specifically conflicts with the decision of the Ninth Circuit in *Weil v. Investments/Indicators Research & Management*, 647 F.2d 18 (9th Cir. 1981), which squarely limited the application of *Garner* to shareholder derivative actions, finding that the policy rationale of *Garner* did not apply in other types of

actions brought by shareholders only for their own benefit.

REASONS FOR GRANTING THE WRIT

1. The Opinion of the Sixth Circuit Conflicts with Opinions of the Fifth Circuit and the Ninth Circuit Regarding the Appropriate Context for Applying the *Garner* "Good Cause" Exception.

The opinion of the Sixth Circuit under review presents an unprecedented and far reaching abrogation of the attorney-client privilege of a corporation that goes far beyond the original precedent for stripping a corporation of its attorney-client privilege announced by the Fifth Circuit in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 28 L.Ed.2d 323, 91 S.Ct. 1191 (1971) ("*Garner*") in affirming a discovery order (App. 19a) that purported to follow and apply that precedent.

Selox contends that *Garner* should only be applied to require the waiver of the attorney-client privilege of a corporation in a shareholder derivative action brought on behalf of the corporation or when shareholders are asserting claims of a quasi-derivative nature for all shareholders. The United States Court of Appeals for the Ninth Circuit has specifically held that *Garner* applies only to shareholder derivative actions, *Weil v. Investment/Indicators Research & Management*, 647 F.2d 18 (9th Cir. 1981), and the United States Court of Appeals for the Fifth Circuit has also limited *Garner* in actions involving corporations and their shareholders as parties, *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988).

In *Garner*, the United States Court of Appeals for the Fifth Circuit created a "good cause" exception to the attorney-client privilege in litigation brought by shareholders of a corporation against the corporation, its officers and directors charging that management had acted inimically to the interests of all shareholders. The case was both a class action asserting common law and securities fraud claims and a derivative action brought on behalf of the corporation in connection with an offering of corporate securities. The Fifth Circuit listed a number of factors relevant to the requirement of "good cause", which the court must balance in order to pierce the attorney-client privilege. 430 F.2d at 1104.

More recently, in *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988), the Fifth Circuit limited the potential scope of *Garner* to litigation between a corporation and its shareholders involving matters of general corporate governance ("quasi-derivative" actions). *Ward* specifically rejected the application of *Garner* to litigation that was neither a derivative action on behalf of the corporation nor a quasi-derivative action on behalf of all shareholders generally.

Selox contends that *Garner* does not apply to this case because it is neither a shareholder's derivative action nor a case in which shareholders are suing the corporation to benefit all shareholders about a matter of general corporate governance. The Sixth Circuit read *Ward* as rejecting any such limitation on *Garner*. App. 8a; 965 F.2d at 130. It also rejected the express limitation adopted by the Ninth Circuit in *Weil*, which limited the application of *Garner* to derivative actions on behalf of the corporation. *Id.*

There is nothing in *Ward* to support the extension of *Garner* to overrule Selox's invocation of attorney-client privilege in a case not brought on behalf of the corporation or all of its shareholders in which the corporation was not a party.[1] *Ward* was an action brought by shareholders against Louisiana Coca-Cola Bottling Company and its corporate officers arising out of the corporation's decision to redeem outstanding stocks in a series of tender offers beginning in 1982. These tender offers and several other stock transactions increased the individual defendants' ownership interest in the corporation from a minority to a majority position between 1979 and 1983. At the end of 1984, the Coca-Cola Company offered to buy the defendant corporation for a price that reflected a two to three times increase in the value of the bottler over that reflected in the per share price paid in the 1982 tender offer.

After the sale to the Coca-Cola Company, the plaintiffs brought an action against the corporation and its corporate officers alleging that the series of redemptions and other tender offers in the early 1980s were part of a calculated plan by the individual defendants to acquire a majority of the corporation's stock with the intent to sell the company for a windfall profit. During this period, the corporation discontinued dividends and took other actions which the plaintiffs claimed constituted part of the individual defendants' plan to "squeeze out" the minority shareholders.

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[1] Although Selox was sued in new actions during the pendency of the Appeal below, the Sixth Circuit viewed the merits as unaffected by whether Selox was a party. App. 13; 965 F.2d at 133.

On appeal, the Fifth Circuit first considered the issue of attorney-client privilege, *Ward, supra*, 854 F.2d 784-787. The defendant corporation attacked the district court's application of *Garner*, arguing that its holding did not extend to alleged violations of securities laws and common law fraud claims arising from tender offers because of the lack of mutual corporate, management and shareholder interests when shares are being redeemed. The Fifth Circuit rejected this argument as a blanket proposition but stated that "*Garner* did *not establish* an absolute exception to its attorney-client privilege rule. 'The attorney-client privilege still has viability for the corporate client. The corporation is not barred from asserting it merely because those demanding information enjoy the status of stockholders.' 403 [sic] F.2d at 1103." 854 F.2d at 785 (emphasis in original).

Reversing the lower courts, which had ordered the breach of the corporation's attorney-client privilege, the Fifth Circuit said the following in *Ward*, which applies equally to the facts of this case:

> This case has little of the appeal of a derivative suit. Here plaintiffs discovered that the company had been sold *three years* after redemption of their stock for a much greater value than they thought it had in 1982. Anyone even casually familiar with the intense competition in most industries in our economy knows, however, that the value of a company can change dramatically in three years—or, for that matter, in three months. A single decision by management can mean boom or bust in a short period of time for even the largest company.

854 F.2d at 786.

As noted by the Fifth Circuit in *Ward, supra*, 854 F.2d at 786, the Ninth Circuit took a more restrictive view of *Garner* in *Weil v. Investment/Indicators Research & Management*, 647 F.2d 18 (9th Cir. 1981). *Weil* was a securities action by a purchaser of shares in an open ended mutual fund against the fund's corporate manager. Plaintiff sued for losses occasioned by the defendant's failure to have the fund's shares registered in some states. The Ninth Circuit refused to apply *Garner* in this context even though the parties to the dispute were in a fiduciary relationship analogous to that of the corporation and its shareholders cited in *Garner*. The court distinguished *Garner*, stating:

> Weil is not currently a shareholder of the Fund, and her action is not a derivative suit. The *Garner* plaintiffs sought damages from other defendants in behalf of the corporation, whereas Weil seeks to recover damages from the corporation for herself and the members of her proposed class. *Garner's holding and policy rationale simply to do not apply here.*

647 F.2d at 23 (emphasis supplied).

These same distinctions apply to the plaintiffs in these cases and their claims against both Selox and the other defendants. The *Weil* rule is a principled limitation of the *Garner* exception and promotes the attorney-client privilege by narrowing the areas in which the potential chill of *Garner* could prevent a corporate client from seeking legal advice.

Selox submits that the reasoning of the Fifth Circuit in *Ward* and the Ninth Circuit in *Weil* supports

Selox's contention that the Sixth Circuit erred as a matter of law in extending *Garner* to Selox's assertion of privilege in this case. Thus, the Sixth Circuit's opinion conflicts with decisions of both the Fifth Circuit and the Ninth Circuit.

As noted, the Sixth Circuit considered the discovery orders that it affirmed to be appropriate even though Selox was not a party to the case when the deposition was taken and the motion to compel was considered in the district court. This view also demonstrates that the opinion of the Sixth Circuit is potentially unlimited and far more intrusive into corporate attorney-client communications than the Fifth Circuit or the Ninth Circuit, neither of which had applied the "good cause" exception to a case in which the corporation was not a party.[2]

2. The Opinion of the Sixth Circuit Effectively Reverses the Burdens of Parties Asserting and Parties Resisting the Corporate Attorney-Client Privilege and Inappropriately Adopts a Single Criterion of Unavailability as Sufficient to Establish the "Good Cause" Exception.

While paying lip service to the importance of the attorney-client privilege and purporting to be guided in its analysis by the *Garner* decision, the Sixth Circuit actually turned *Garner* analysis on its head and converted *Garner* from a limited "good cause" exception in the context of shareholder derivative ac-

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[2] The fact that Selox has now been sued in new actions consolidated with the original cases does not weaken this argument for such consolidation may not change the rights of Selox as of the time this dispute arose. *See Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 77 L.Ed. 1331, 53 S.Ct. 721 (1933); *MacAlister v. Guterma*, 263 F.2d 65, 69 (2d Cir. 1958).

tions into a general rule requiring disclosure of privileged communications in any litigation between the corporation and its shareholders unless the corporation carries the burden of showing why the privilege should not be breached.

While correctly noting that *Garner* "only applies to cases in which the corporation stands in a fiduciary relationship to those seeking to abrogate the attorney-client privilege" App. 12a, 965 F.2d at 132, *citing Garner*, 430 F.2d at 1103, the Sixth Circuit then makes the following extraordinary statement which is completely unsupported by *Garner* or by any of the cases that have applied it:

> When a corporation asserts the privilege in an action by its shareholders, it is entitled to prevent disclosure of such information only if the policy underlying the privilege requires withholding evidence when balanced against the rights of shareholders and the fundamental responsibility of every person to testify. *Id.*

App. 12a; 965 F.2d at 132.

Whereas *Garner* recognized the vitality of the attorney-client privilege and established a fairly narrow context within which shareholders in litigation with the corporation might be given the opportunity to establish an exception, the foregoing passage from the opinion of the Sixth Circuit effectively makes the right to compel privileged testimony the rule and imposes upon the corporation the burden of establishing that the privilege, on balance, should not be upheld against the claims of the shareholders. Even if this were a correct reading of *Garner*, the Court of

Appeals never explains why, in the context of a case in which the shareholders are not suing on behalf of the corporation and are not raising matters of general corporate governance, the policy considerations upon which the privilege is based—particularly the importance of encouraging free and open discussion by corporate clients with their counsel—do not overcome the particular claims of need of shareholders who have absolutely no interest in the corporate defendant other than as a deep pocket.

This Court recognized the vitality and importance of the attorney-client privilege to the modern business corporation in *Upjohn Co. v. United States*, 449 U.S. 383, 66 L.Ed.2d 584, 101 S.Ct. 677 (1981), where the Court stated:

> Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence §2290 (McNaughton rev 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S.

> 40, 51, 63 L.Ed.2d 186, 100 S.Ct. 906 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403, 48 L.Ed.2d 39, 96 S.Ct. 1569 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470, 32 L.Ed. 488, 9 S.Ct. 125 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

449 U.S. at 389, 66 L.Ed.2d at 591.

The Sixth Circuit has now deleted the public interest protected by the attorney-client privilege as one of the concerns of *Garner*, where the Fifth Circuit stated:

> [When] the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, *protection of those interests as well as those of the corporation and of the public* require that the availability of the privilege be subject to the right of the stockholders to show cause but should not be invoked in the particular instance.

Garner, 430 F.2d at 1103 (emphasis supplied).

In this case, the Sixth Circuit did not point to any allegations or proof that Selox had acted inimically to stockholder interests.[3] It pointed to no allegations or proof showing that the plaintiffs sought to protect the interests of the corporation. It pointed to no allegations or proof of any public interest mandating the abrogation of privilege in this case.

Of all of the criteria set forth in *Garner*, which are to be balanced in determining whether the privilege should be breached, the only one that the Sixth Circuit actually found support for was that the plaintiffs arguably could not obtain the information they sought about the privileged conversations from any other source than attorney Richardson. The Sixth Circuit cited no proof, however, that the facts needed were unavailable from other persons. Moreover, the entire point to the attorney-client privilege is that matters discussed in confidence with counsel for the purpose of obtaining legal advice are not matters of general knowledge openly available to shareholders. The confidentiality expected when secrets are disclosed to counsel is a prerequisite to the assertion of attorney-client privilege; therefore, unavailability from other sources is always present whenever a privileged communication is in issue, and singling out this one criterion from the *Garner* list as a sufficient basis to strip the privilege in the absence of any of the other policy considerations supporting the "good cause" inquiry in the first place is completely inappropriate.

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[3] The Magistrate found that Selox had not been accused of any wrong by the plaintiffs. *See Order* App. 27a.

3. The Opinion Of The Sixth Circuit Incorrectly Allows A General Fiduciary Relationship Between A Corporation And Its Shareholders To Provide An Automatic Basis For Applying *Garner* Even Though, Under Controlling Local Law, There Is No Fiduciary Relationship In The Context In Which This Dispute Arose.

As noted above at 15, the Sixth Circuit acknowledges that *Garner* "only applies to cases in which the corporation stands in a fiduciary relationship to those seeking to abrogate the attorney-client privilege." App. p.12a, 965 F.2d at 132.

Selox had urged this very point in the Sixth Circuit and argued further that applicable Tennessee law clearly established that there was no fiduciary relationship between a corporation and its minority shareholders in the factual context of this case, the purchase and sale of the stock of the corporation.

The Sixth Circuit acknowledges this argument in its opinion, quoting Selox's principal brief:

> Selox asserts that the "analytical focus" of cases where *Garner* is involved to compel disclosure of privileged communication stresses "a requirement of fiduciary relationship between the parties seeking the discovery and the parties resisting compelled privileged communications."

App. 9a; 965 F.2d at 131.

The opinion ignored, however, Selox's additional argument that the corporation and the parties seeking disclosure must stand in a fiduciary relationship with respect to the subject matter of the litigation. This well-precedented contention is not answered by the

Court's opinion. It is the point of cases such as *Quintel Corp. N.V. v. Citibank, N.A.*, 567 F.Supp. 1357 (S.D.N.Y. 1983) and *In re Atlantic Financial Management Securities Litigation*, 121 F.R.D. 141, 146 (D.Mass 1988), where the application of *Garner* depended upon the existence of a fiduciary duty with respect to the matter in dispute. Without such a limitation on *Garner*, a corporation would never be able to assert attorney-client privilege whenever shareholders sought privileged information, because state laws uniformly hold that corporate management owes fiduciary duties to the corporation and hence to its shareholders.

This untoward and unintended result follows because the Sixth Circuit failed to view plaintiffs' discovery motion against the background of their claims against White—his purchase of their shares for his own allegedly wrongful purposes and ends—to which Tennessee law applies no fiduciary obligation on the corporation and its management.

The Sixth Circuit ignored or misquoted the controlling authority and found that general but undefined fiduciary obligations exist under Tennessee law in general and, therefore, must exist in the context of a purchase of shares by the corporation or its management from minority shareholders. (App. 13a; 965 F.2d at 133.)

The Sixth Circuit first stated that Selox may not rely on the holding of the Tennessee Supreme Court in *Shaw v. Cole Manufacturing Co.*, 132 Tenn. 26, 177 S.W. 479 (1915) that neither corporations nor their directors owe fiduciary duties to minority shareholders when it comes to buying stock. The only basis cited by the Sixth Circuit against this reliance is that

"later Tennessee cases have made it clear that one who is an officer, director and controlling stockholder owes a fiduciary duty to other stockholders," citing *Dale v. Temple Co.*, [sic] 186 Tenn. 69, 208 S.W.2d 344 (1948) and *Maggiore v. Bradford*, 310 F.2d 519 (6th Cir. 1962).[4] (App. 9a-10a; 965 F.2d at 131.) The Sixth Circuit then erroneously cites *Johns v. Caldwell*, 601 S.W.2d 37 (Tenn. App. 1980) as the "most recent discourse" on the question. *Id.* This analysis is simply wrong on several counts.

The citation to *Johns v. Caldwell* as the last word in Tennessee against Selox's argument is inaccurate and relies on selectively editing the passage cited, compounding an error committed by the Magistrate Judge. (*See* Order App. 26a-27a.) It also ignores that *Johns v. Caldwell* dealt with precisely the issue raised below—whether a corporation or director owes fiduciary duties to minority shareholders when buying stock,— and in fact held that no such duties apply under Tennessee law. The Sixth Circuit and this Court cannot omit and ignore the last paragraph of the full relevant quotation in *Johns v. Caldwell*, which is taken verbatim from *Shaw*. The entire passage reads:

> It is apparent from the above cases that directors and officers owe a fiduciary relationship to the corporation and its shareholders. It is further apparent that majority stockholders owe a fiduciary relationship to minority stockholders.

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[4] Neither the plaintiffs nor the district court relied on either of these cases. Selox did not argue that a corporation never stands in a fiduciary relationship to its shareholders as the Sixth Circuit mischaracterizes Selox's argument, App. 9a, 965 F.2d at 1131.

> However, no authority has been submitted to the Court stating that a minority stockholder stands in a fiduciary relationship to a majority stockholders. Furthermore, no authority has been submitted to the Court stating that all shareholders stand in a fiduciary relationship with one another as to the purchase and sale of stock. In fact, Tennessee has specifically held that there is no such fiduciary relationship.
>
> > "While directors occupy a trust relation to the corporation which they direct, their duty does not apply to the stockholders in the sale and purchase of stock. Dealing in its own stock is not a corporate function. In buying or selling stock, directors may trade like an outsider, provided they do not affirmatively act or speak wrongfully, or intentionally conceal facts with reference to it." *Shaw v. Cole Manufacturing Company*, 132 Tenn. 210, 177 S.W. 479 (1915).

601 S.W.2d at 41-42.

If *Johns v. Caldwell* were the last word on the subject, a fair reading of the entire case would still support Selox's argument. This case was not the last word by the Tennessee Supreme Court, however, on the continued vitality of the rule in *Shaw v. Cole Manufacturing Co.* In fact, *Vance v. Schulder*, 547 S.W.2d 927 (Tenn. 1977) is the latest word from the Tennessee Supreme Court, and was cited to the Sixth Circuit by Selox.

Vance involved a claim of fraud on a minority shareholder by directors of a Tennessee corporation

who solicited the purchase of plaintiff's stock in connection with a pending offer for the company. Plaintiff claimed that one of the defendants, a director and controlling shareholder, falsely represented the value of the consideration offered for the company. Defendant pleaded the statute of limitations.

At issue before the Tennessee Supreme Court was whether plaintiff's cause of action was governed by the three year statute governing the tort of fraud or whether the six year statute governing actions for breach of contract applied. The Supreme Court opted for the fraud statute, based on the following correct statement of Tennessee law:

> In this determination it is important to distinguish this transaction from the more typical situations where corporate directors or officers wit inside information purchase or sell stock detrimentally to stockholders at large. In this state and the majority of jurisdictions the common law imposed no fiduciary duties on directors or officers with regard to trading stock with general stockholders. It is said that directors could trade as if outsiders. *Shaw v. Cole Mfg. Co.*, 132 Tenn. 210, 177 S.W. 479 (1915); 2A *Fletcher Cyclopedia Corporations* §1168.1, 283 (1975). Actions based on such fiduciary breaches, if allowed, would be quasi-contractual in nature and thus the six (6) year statute would be applicable. *Wallace v. Lincoln Saving Bank*, 89 Tenn. 630, 15 S.W. 448 (1891).

547 S.W.2d at 931.

In applying the three year tort statute, the Tennessee Supreme Court thus explicitly rejected the view that officers, directors or controlling shareholders owed fiduciary duties to the selling minority shareholders in a case alleging that the plaintiff sold shares as a result of misrepresentation by the controlling shareholder, the gravamen of plaintiffs' case against White. In its footnote to the passage quoted above, the Tennessee Supreme Court noted that "[t]he harshness of this rule has resulted in various statutory provisions prohibiting or regulating inside trading. See T.C.A. §48-1601 et seq.; The Securities Act of 1933, 15 U.S.C.A. §77a et seq. and The Securities Exchange Act of 1934, 15 U.S.C.A. §78a et seq." *Id.* n.3. Of course, these statutes and related rules clearly delineate the disclosure obligations of corporations and management in connection with the purchase or sale of stock, which the Sixth Circuit's opinion does not do, in announcing that unspecified fiduciary duties exist.

The decision in *Dale v. Thomas H. Temple Co.*, 186 Tenn. 69, 208 S.W.2d 344 (1948) is totally inapposite to the existence of fiduciary duties in this factual context. *Dale* involved a sale on credit of a controlling block of stock by a large shareholder of the corporation at an excessive price under circumstances in which the seller knew that the buyer, a corporate finagler of unsavory reputation, could not repay without looting and dissipating the corporation's assets in clear disregard of the interests of the remaining minority shareholders. The action in *Dale* was brought by the corporation's receiver to recover sums that had been looted by a variety of schemes and artifices. *Dale* had nothing to do with the purchase by a di-

rector or controlling shareholder of a minority shareholder's stock. *Dale* is an example of the rule that majority shareholders owe a fiduciary duty to the minority and to the corporation not to transfer control to a buyer who would clearly harm the corporation by committing fraud on the company and looting the corporate treasury. *See e.g. KDT Industries, Inc. v. Home Insurance Co.*, 603 F.Supp. 861 (D.Mass. 1985); 12B *Fletcher Cyclopedia Corporations* §5811 n.4 (1991 Cumm. Supp.).

Maggiore v. Bradford, 310 F.2d 519 (6th Cir. 1962) was a similar case. As the court stated there: "Looking through the corporate maze, the deal was simply one whereby the majority shareholders were using corporate assets to finance their purchase of [their own controlling] stock." *Id.* at 521. This was held to amount to constructive fraud on the minority. The case did not involve a purchase of minority shares by the company or its directors or controlling shareholders.

Selox's reliance on *Shaw v. Cole Manufacturing Co.* is undiminished by the cases cited by the Sixth Circuit in its opinion. In rejecting *Shaw, Vance* and *Johns* as controlling on this issue, the Sixth Circuit abandoned a body of decided law on this particular subject and effectively overruled the Tennessee Supreme Court, which it should not be permitted to do. *See Cooper v. American Employers' Insurance Company*, 296 F.2d 303, 307 (6th Cir. 1961) (court of appeals should avoid becoming court of first instance on question of state law); *cf. Parham v. Hardaway*, 555 F.2d 139, 140 (court of appeals should accept district judge's *tenable* view of state law in the absence of any *authoritative* state court interpretation.) Without the central ele-

ment of the fiduciary relationship rejected by *Shaw*, by *Vance*, and by *Johns*, with respect to the transactions at issue the Sixth Circuit's application of *Garner* in the case at bar provides for the automatic and unprincipled application of *Garner* to any request by any shareholder, past or present, demanding the breach of the attorney-client privilege and cannot stand.

CONCLUSION

The opinion of the Sixth Circuit is in conflict with and goes far beyond the opinions of any of the other Courts of Appeal applying the *Garner* "good cause" exception to corporate attorney-client privilege. In the process, it completely abandons the case law developed in those circuits limiting *Garner* to derivative actions or at least quasi-derivative actions. The opinion of the Sixth Circuit invites further intrusion into corporate attorney-client privilege simply on the basis that corporations owe fiduciary duties to their shareholders as a general proposition even if no fiduciary relationship existed between the parties seeking discosure and the corporation or management resisting disclosure with respect to the subject matter at issue in the case. *Garner* has thus now been extended to a RICO action in which the plaintiffs, all former shareholders, do not seek to benefit the corporation at all and do not even sue over a matter of general corporate governance that would arguably fall within the originally stated policy arguments of *Garner* as a means of vindicating some greater public interest served by state corporation law.

This Court should grant the writ of certiorari and, upon full briefing and argument, reverse the opinion of the Sixth Circuit so as to limit *Garner* to shareholder derivative actions or, at most, to actions in which shareholders are in litigation with the corporation over matters of general corporate governance that affect all shareholders equally.

The writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 21, 1992

APPENDIX

No. 91-6087

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THOMAS A. J. FAUSEK, et al.,
Plaintiffs-Appellees,

v.

ROBERT E. WHITE, et al.,
Defendants,

SELOX, INC.,
Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee

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Decided and Filed June 5, 1992

Before: MARTIN, Circuit Judge; and LIVELY and BROWN, Senior Circuit Judges.

LIVELY, Senior Circuit Judge. This appeal concerns a claim of attorney-client privilege. The privilege was claimed on behalf of a corporation that is not a party to the action. The issue arose when the plaintiffs attempted to depose an attorney who had advised the corporation and its controlling shareholder about financial dealings of the controlling shareholder involving stock of the corporation.

I.

The plaintiffs are former shareholders of Selox, Inc. who allege that the defendant Robert E. White abused his position as majority shareholder, director and chief executive officer of Selox to the financial detriment of the plaintiffs. In the course of discovery the plaintiffs subpoenaed Joel Richardson, an attorney for Selox and Robert White during the time in which the plaintiffs claim that White engaged in wrongful activities, to testify by deposition and to produce certain documents.

Richardson appeared for the deposition, but failed to produce the subpoenaed documents and refused to answer numerous questions concerning discussions with Robert White, other officers and directors of Selox, and parties with whom Selox had financial transactions during the period in question. An attorney for Selox attended the deposition and claimed an attorney-client privilege on behalf of Selox when plaintiffs' counsel propounded questions to Richardson about his discussions with Robert White and other Selox officers and directors. Richardson refused to answer the questions and they were certified to a magistrate judge.

Following a hearing the magistrate judge denied Selox's claim of privilege and directed Richardson to answer the questions and to provide the subpoenaed documents in his possession. Selox appealed to the district judge who had referred the case to the magistrate, and the district court affirmed the magistrate's order without opinion. Selox filed an interlocutory appeal and a motions panel of this court stayed the district court's order pending a hearing and decision by a regular panel of the court. Following oral argument the case was submitted to the present panel, and we now affirm the decision of the district court.

II.

The plaintiffs, owners at one time of approximately forty percent of Selox's outstanding stock, sued Robert

White and the other defendants directly in their individual capacities and did not plead a derivative action on behalf of Selox. The substance of their claim is that Robert White misrepresented the value of Selox stock as $13 to $15 per share at a time when he had in hand a qualified appraisal of its value at $116 per share. Robert White eventually sold Selox for $168 per share. This occurred, according to the plaintiffs, after White had engaged in an extensive fraudulent scheme to "squeeze out all minority shareholders" and had gained sole control of the corporation. According to the plaintiffs, Robert White, by virtue of his positions as majority shareholder, director and CEO, caused Selox to pay him an "exorbitant salary" and allowed him to "charge his personal nondeductible expenses to Selox." In addition, White allegedly misappropriated corporate opportunities for his own personal gain. The plaintiffs claim that White's actions caused the cash flow of Selox to be drained, and dividend payments to shareholders therefore ceased, thus reducing the apparent value of Selox stock.

The plaintiffs also claim that White met with potential buyers of Selox in the early 1980s, unbeknownst to the minority shareholders. The purpose of these meetings was to ascertain the market price of Selox, a price that turned out to be more than seventy million dollars (the amount for which White eventually sold Selox), or the equivalent of $168 per share. Not only did White fail to disclose these meetings with potential purchasers of the corporation, but he allegedly repeatedly told the other directors and shareholders that he was not interested in selling Selox.

Additionally, the plaintiffs claim that the fraudulent scheme included machinations involving Robert White's divorce. During divorce proceedings, White estimated the value of his Selox stock as $13 per share in a prepared financial statement dated August 19, 1987. However, a March 1987 financial statement that White used for other purposes valued his stock at $116 per share.

During this same period, White negotiated and obtained releases from his brothers, James and William White. These agreements purported to release Robert White from all liability relating to the purchase of Selox stock from his brothers. William White was paid one million dollars for his release. A covenant not to sue was also acquired from Robert White's son, Robert E. White, III, when White repurchased his son's Selox stock. It was shortly after all the releases were obtained that Selox was sold for more than seventy million dollars.

Robert White and Selox were represented by the law firm of Miller & Martin, specifically by Joel Richardson. Richardson assisted in the negotiations for the liability releases and stock acquisitions from the former shareholders. The plaintiffs sought to discover Richardson's communications with Robert White concerning these transactions. Counsel for the plaintiffs asked questions about specific incidents and Richardson refused to answer on the ground that they sought confidential communications with Robert White and other Selox officials, and were protected by an attorney-client privilege.

III.

The attorney-client privilege permitting a witness to withhold testimony is an exception to the general rule that a court is entitled to every witness's testimony and that witnesses fully disclose information known to them when called to testify. Thus, it should be construed narrowly. *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985). In *Humphreys, Hutcheson*, we described the elements of the privilege:

> This court set forth the essential elements of the attorney-client privilege in *United States v. Goldfarb*, 328 F.2d 280 (6th Cir.), *cert. denied*, 377 U.S. 976, 84 S. Ct. 1883, 12 L.Ed.2d 746 (1964), as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.
>
> *Id.* at 281, (quoting 8 J. Wigmore, *Evidence in Trials At Common Law* § 2292, at 554 (McNaughton rev. 1961))

755 F.2d at 1219 (footnote omitted).

The Supreme Court has recognized the importance of the privilege. In *Upjohn Co. v. United States*, 449 U. S. 383 (1981), the Court stated:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.

Id. at 389.

Although important, the attorney-client privilege is not absolute; it applies only to the extent that it serves the "broader public interests." It has no application to legal advice in aid of a fraudulent scheme or criminal activity. See *In Re Antitrust Grand Jury*, 805 F.2d 155, 162 (6th Cir. 1986) ("All reasons for the attorney-client privilege are completely eviscerated when a client consults an attorney not for advice on past misconduct, but for legal assistance in carrying out a contemplated or ongoing crime or fraud.")

It has been settled law since *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971), that a corporation may claim an attorney-client privilege to prevent an attorney from testifying about confidential communications with the corporation as a client. See *United States v. Bartone*, 400 F.2d 451, 459 (6th Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969) (the privilege extends to corporations, but is not all inclusive.); *Fischer v. Wolfinbarger*, 45 F.R.D. 510 (W.D. Ky. 1968).

In *Garner*, Judge Godbold found that the corporation claiming the privilege was not entitled to invoke it. He reached this conclusion after weighing the policy considerations upon which the privilege is based in the context of the claims in the particular case. This involved "a balancing of interests between injury resulting from disclosure and the benefit gained in the correct disposal of litigation." *Garner*, 430 F.2d at 1101.

Judge Godbold found it significant that a corporation "is an entity which in the performance of its functions acts wholly or partly in the interest of others" and that it was those "others" who were seeking access to the substance of the communications in question. *Id.* He cautioned also that it "must be borne in mind that management does not manage for itself [because] the beneficiaries of its action are the stockholders." *Id.* Thus, while management has discretion in putting legal advice to use, its judgment "must stand on its own merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised." *Id.*

The *Garner* court summarized its rationale for according corporations a narrowly confined attorney-client privilege and provided the basis for a "good cause" determination of its applicability in particular cases:

> The attorney-client privilege still has viability for the corporate client. The corporation is not barred

from asserting it merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.

D. Good Cause

There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons. The court can freely use *in camera* inspection or oral examination and freely avail itself of protective orders, a familiar device to preserve confidentiality in trade secret and other cases where the impact of revelation may be as great as in revealing a communication with counsel.

Id. at 1103-04 (footnote omitted). We have quoted at length from *Garner* because it is the seminal case, and we agree with its rationale and adopt its holding.

IV.

A.

Selox presents three principal arguments for reversal.

(1)

Selox maintains that *Garner* applies only in shareholder derivative actions and that all policy considerations favor applying the privilege in cases where the plaintiffs act only for their own benefit rather than on behalf of the corporation. This argument finds support in *Weil v. Investment/Indicators, Research & Management*, 647 F.2d 18 (9th Cir. 1981). In *Weil* the court emphasized that the plaintiff in *Garner* sought damages on behalf of the corporation, whereas Weil sought to recover from the corporation only for her own benefit and on behalf of a proposed class. Declining to apply *Garner*, the *Weil* court upheld the corporation's claim of privilege.

To the extent *Weil* holds that the attorney-client privilege of a corporation is absolute in a case brought by individual shareholders in their own right, we disagree. Nothing in the language or the reasoning of *Garner*, as expressed by Judge Godbold, so limits its holding. Furthermore, the Fifth Circuit has rejected the *Weil* court's limitation on *Garner*. See *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988). The fact that shareholder-plaintiffs seek recovery for themselves only may render their motives more suspect than if they bring a derivative action. Nevertheless, this is just one factor to be considered in determining whether good cause exists to deny the application of the privilege in a particular case. *Ward*, 854 F.2d at 786.

(2)

Selox also contends that *Garner* does not apply because the corporation is not a party to the action. This argument overlooks the fact that the plaintiffs' entire case is based upon the claim that Robert White, by means of a fraudulent scheme, became the sole owner of Selox after "squeezing out" all minority shareholders. Thus, according to the plaintiffs' theory, White became the alter ego of the corporation.

We find nothing in *Garner's* reasoning that would preclude application of its principles in the present case merely because Selox is not a named party. The plaintiffs have relied on very specific instances in which they claim that Selox, under direct control of Robert White and pursuant to his fraudulent scheme, acted to their detriment as minority shareholders of Selox. The fact that Selox is not a defendant is not controlling. At this stage in the proceedings the district court was justified on the basis of the allegations and proof so far produced in considering Selox's claim of privilege under the *Garner* principles.

(3)

Selox places heavy reliance upon the contention that there is no fiduciary relationship between it and its shareholders. Selox asserts that the "analytical focus" of cases where *Garner* is invoked to compel disclosure of privileged communications stresses "a requirement of a fiduciary relationship between the parties seeking the discovery and the parties resisting compelled privileged communications." Selox then seeks to demonstrate that under Tennessee law there is no fiduciary relationship between a corporation and its shareholders. Selox's reliance on *Shaw v. Cole Mfg. Co.*, 132 Tenn. 210 (1915), is misplaced. *Shaw* held that a director's "trust relationship to the corporation" does not apply to a stockholder with whom the director deals in buying or selling stock of the corporation. The court stated that "[i]n buying or selling stock, directors may trade like an

outsider, provided they do not affirmatively act or speak wrongfully, or intentionally conceal facts with reference to it." *Id.* at 212.

Later Tennessee cases have made it clear that one who is an officer, director and controlling stockholder owes a fiduciary duty to other stockholders. *Dale v. Temple Co.*, 186 Tenn. 69 (1948). In a case from Tennessee, this court cited *Dale* with approval, stating, "It is well-settled that dominant or controlling shareholders who exercise control over a corporation are fiduciaries." *Maggiore v. Bradford*, 310 F.2d 519, 521 (6th Cir. 1962). In its most recent discourse on the question of fiduciary duty between shareholders and a corporation or among shareholders, the Tennessee Court of Appeals wrote that while a *minority* shareholder owes no fiduciary duty to the corporation or a majority shareholder, "a controlling shareholder owes a fiduciary duty to other shareholders." *Johns v. Caldwell*, 601 S.W.2d 37, 41 (Tenn. App. 1980).

B.

The plaintiffs' arguments respond to those of Selox, and adopt the reasoning of the magistrate judge.

(1)

The plaintiffs contend that the *Garner* analysis applies to Selox's claim of privilege even though Selox is not a named party and this is not a derivative action. When Richardson advised White, White was the representative of Selox and had control of the corporation. Richardson's professional relationship to the corporation was exercised through White and this action against White was, in effect, a suit against Selox.

(2)

The plaintiffs, in reliance on the later Tennessee cases, assert that Robert White had a fiduciary duty to them as minority shareholders, and that he breached that duty.

Their efforts to recover their losses should not be thwarted by the fact that White acted in the name of the corporation, which he controlled, thus permitting the corporation to shield White by its claim of privilege.

(3)

The plaintiffs argue that no court has permitted invocation of the attorney-client privilege to prevent disclosure of evidence of a crime or fraudulent activity. They contend that sufficient evidence was produced to establish a prima facie case of a serious crime or illegality. This being so, neither Robert White nor Selox may rely on the attorney-client privilege to prevent Richardson's testimony concerning the specific matters about which the plaintiffs seek to question him. This is not a "fishing expedition," the plaintiffs contend. Rather, they have shown the likelihood that they will be able to prove their allegations and no veil of secrecy should keep them from developing their case fully.

(4)

Finally, the plaintiffs argue that to the extent Richardson and White discussed personal rather than corporate matters (e.g. the divorce action in which Richardson also represented Robert White), there is no basis for a claim of privilege by Selox. The client, not the attorney, is the holder of the privilege, and Selox was not Richardson's client in these matters.

We agree with the plaintiffs' arguments set out above as (1) and (2), as discussed in Part V, infra. Arguments (3) and (4) are correct statements of the law relating generally to the attorney-client privilege, and apply to all who claim the privilege. We need not consider them further except to the extent they are "good cause" considerations under *Garner*.

V.

A.

We begin our analysis with several principles gleaned from cases heretofore discussed. The attorney-client privilege creates an exception to the general rule that a court is entitled to every witness's testimony, and therefore it must be narrowly construed. *Humphreys, Hutcheson*, 755 F.2d at 1219. The privilege never applies to testimony concerning ongoing or contemplated criminal or fraudulent activity. *In Re Antitrust Grand Jury*, 805 F.2d at 162. The attorney-client privilege extends to corporations, but it is not absolute. *United States v. Bartone*, 400 F.2d at 461. *Garner* only applies to cases in which the corporation stands in a fiduciary relationship to those seeking to abrogate the attorney-client privilege. There is a mutuality of interests between a corporation and its shareholders that precludes use of the privilege by management to deprive shareholders of information relating to their investments in the corporation. *Garner*, 430 F.2d at 1103. When a corporation asserts the privilege in an action by its shareholders, it is entitled to prevent disclosure of such information only if the policy underlying the privilege requires withholding evidence when balanced against the rights of shareholders and the fundamental responsibility of every person to testify. *Id.*

In conducting the required balancing, a court must take into account the nature of a corporation. Unlike an individual client who seeks legal advice, a corporation is an entity that acts on behalf of others, its shareholders. When the litigants seeking information from a corporation's attorney are minority shareholders, these litigants are the beneficiaries of a fiduciary relationship with the corporation and its controlling officers and directors. Although management has discretion as to how to apply legal advice, when shareholders present a colorable claim of fraud or criminal activity that is inimical to their interests as shareholders, they must be given an opportunity to establish good cause why the

attorney-client privilege should not be invoked in their particular case.

B.

Applying these principles, we have no difficulty in concluding that the magistrate judge and the district court properly refused to permit Selox to rely upon the attorney-client privilege in this case. Selox and Robert White owed fiduciary duties to the minority shareholder-plaintiffs. The claims of fraud on the part of Robert White, using his position as the controlling shareholder, director and CEO of Selox have been stated with particularity. The questions propounded to Richardson and the documents subpoenaed related to specific activities alleged to constitute part of an ongoing scheme to deprive the plaintiffs of the value of their investments.

We have examined each of the Selox-White transactions with minority shareholders and outside interests concerning which the plaintiffs sought testimony and documentary evidence from Richardson. In each case we conclude that the plaintiffs have established good cause for not permitting Selox to rely on the privilege. Application of *Garner's* non-exclusive list of good cause indicia leads inevitably to this result. The plaintiffs owned approximately forty percent of Selox's stock before White began his allegedly fraudulent activities. They claim to have been led to sell that stock, ultimately to White, through White's misrepresentations, refusals to divulge essential financial information about the corporation, and manipulation of the corporation's finances to his benefit and their detriment. The information is not readily available, if at all, from other sources. Selox, whether a party to the action or not, should not be permitted to prevent disclosure of the information sought by the plaintiffs on the basis of this record.

C.

We note, of course, that this opinion is based on pleadings and discovery only. There has been no trial, and in affirming the district court's evidentiary ruling we have not decided the merits of the claims and intimate nothing about the final decision on the merits.

The orders that are the subject of this interlocutory appeal are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-6087

THOMAS A. J. FAUSEK, et al.,
Plaintiffs-Appellees,

v.

ROBERT E. WHITE, et al.,
Defendants,

SELOX, INC.,
Appellant.

Before: Martin, Circuit Judge; Lively and Brown, Senior Circuit Judges

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FILED

JUN 5 1992

LEONARD GREEN, Clerk

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Tennessee at Chattanooga.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the orders of the district court that are the subject of this interlocutory appeal are affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Leonard Green, Clerk

A True Copy.

Attest:

/s/ Diane Schnur
Deputy Clerk

Issued as Mandate: 8/18/92

COSTS: No Costs

Filing Fee ..... $
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-6087

THOMAS A.J. FAUSEK, ET AL.,
Plaintiffs-Appellees,

v.

ROBERT E. WHITE, ET AL.,
Defendants,

SELOX, INC.,
Appellant.

BEFORE: MARTIN, Circuit Judges; LIVELY and BROWN, Senior Circuit Judges.

FILED

JUL 23 1992

LEONARD GREEN, Clerk

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

NO. CIV-1-89-185

THOMAS A. J. FAUSEK, ET AL.

V.

ROBERT E. WHITE, ET AL.

FILED
OCT 19 1990

U.S. DISTRICT COURT
EASTERN DIVISION

BY DEPUTY CLERK

ORDER

This matter was referred to the undersigned by the standing orders of this Court and comes before the Court on the plaintiffs' motion to compel answers on oral examination [Docs. 190, 190a], and defendant Robert E. White's response thereto [Doc. 202], as well as the memorandum of Selox, Inc. ["Selox"] [Doc. 206]. Selox, while not a party to this action, opposes the plaintiffs' motion to the extent that the granting of the motion would require divulgence of communications that are within Selox's privilege. A hearing was held on this matter on October 10, 1990.

The plaintiffs' motion seeks to compel Attorney Joel W. Richardson of the law firm of Miller & Martin to answer questions on oral examination. Mr. Richardson and the

firm of Miller & Martin are the former corporate counsel of Selox, and also represented the defendant, Robert E.White, in certain personal matters. During this period of representation, the defendant Robert E. White was a major shareholder, Director, and the Chief Operating Officer of Selox. At issue in this matter is whether or not the attorney-client privilege is available to protect conversations between members of the firm of Miller & Martin, specifically Mr. Richardson, and Mr. White.

The factual allegations made by the plaintiffs in this cause are as follows: that in mid-1980 the defendant Robert white, an officer, director and major shareholder of Selox, set in motion a scheme or plan to fraudulently "squeeze out all minority stockholders" and to gain control of Selox so that he could profit financially. The plaintiffs basically allege that beginning in 1980, in furtherance of this scheme, defendant White caused the corporation to pay him an exorbitant salary and that he began to charge his personal nondeductible expenses to Selox. Throughout this period the defendant also allegedly appropriated corporate opportunities for his own personal gain and to the detriment of the corporation. This, in turn, caused the cash flow of Selox to be drained, which resulted in the cessation of the payment of dividends to shareholders of the corporation. The plaintiffs allege that all of this activity by the defendant was intended to place pressure on minority shareholders to sell their stock.

During the period from 1980 until Selox was sold for an amount in excess of seventy million dollars (on the basis of $168 per share), the plaintiffs allege that defendant White met with potential buyers of Selox and learned that the purchase price for the corporation was in the millions of dollars. The plaintiffs further allege that the defendant, in breach of his fiduciary duties to the corporation's minority shareholders, did not disclose the fact of these meetings to the other shareholders or to the Board of Directors. In fact, it is alleged that during this time, defendant White

repeatedly stated that he was not interested in selling Selox, which statements were in direct opposition to his activity. The plaintiffs allege that the fact of defendant White's scheme or plan is evidenced and supported by these statements as well as by his domination of the Board of Directors of the corporation and by his acquisition of stock of minority shareholders and causing the corporation to buy back outstanding shares as treasury stock, at prices which were far less than that which he then knew outsiders were willing to pay.

The plaintiffs also claim that the existence of the plan or scheme is supported by certain of the actions of defendant White during the period proceeding and up to his divorce. Specifically, the plaintiffs point to a financial statement prepared by defendant White's accountants on August 19, 1987, in which the declared value of defendant White's Selox stock (as of July 31, 1987) was $13.00 per share. This financial statement was prepared for use in defendant White's divorce. (It is noted that $13.00 per share is the approximate price defendant White paid his brothers and other minority shareholders for the stock which he bought from them for himself and for Selox). However, in March, 1987 a financial statement had been prepared on defendant White's behalf in which the value of the Selox stock was represented as $116.00 per share.

In addition, during this same period, defendant White began attempting to, and did in fact, obtain documents from his brothers, James A. White and William White. These documents contained provisions which purportedly released defendant White from all liability related to his purchase of Selox stock from his brothers. It should be noted that one brother, William was paid one million dollars for his release. Defendant White also obtained a covenant not to sue from his son, Robert E. White, II, during this period. Simultaneous with or soon after he obtained these releases, Selox was sold for close to seventy million dollars, at over $168.00 per share.

Both defendant White and Selox were represented by the law firm of Miller & Martin, and specifically by Joel W. Richardson during much of the time the alleged fraudulent activities of defendant White were taking place. Specifically, defendant White and Selox were represented by Miller & Martin and Mr. Richardson when negotiations were conducted with, and shares were purchased from, certain former Selox stockholders and also when defendant White negotiated and obtained releases from his brothers and son. Plaintiffs assert that because the law firm of Miller & Martin represented both Selox and defendant White, they have established a classic case of dual representation of clients with conflicting interests. They claim that defendant White, during this period of dual representation, was engaged in fraudulent activities. They therefore assert that he should not be allowed to use the attorney-client privilege to protect his fraudulent behavior and to keep his fraudulent scheme from being discovered. They therefore ask that the Court order questions surrounding communications between Mr. Richardson and defendant White be answered.

The attorney-client privilege has been codified and is set forth in Tenn. Code Ann. § 23-3-105 as follows:

> No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or a person who consulted him professionally, to disclose any communication made to him as such by any such persons, during the pendency of the suit, before or afterwards, to his injury.

The undersigned agrees with the plaintiffs and holds that defendant White will not be allowed to use the attorney-client privilege to shield discovery of communications which may relate to his allegedly wrongful conduct. While mindful of the fact that the attorney-client privilege is an important foundation in our legal system, the undersigned is of the opinion that the privilege should be

suspended in certain situations. In addition, the undersigned recognizes that Selox is not a party to this action and opposes the suspension of the privilege as it relates to the corporation. However, to allow the privilege to stand and protect communications between Selox and counsel would only give the defendant White another opportunity to hide any fraudulent conduct and cannot be allowed.

As pointed out by all parties, *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied* 401 U.S. 974 (1971), is a leading case in the area of the availability and application of the attorney-client privilege in the corporate setting. The *Garner* case dealt with the question surrounding "the availability to a corporation of the privilege against disclosure of communications between it and its attorney, when access to the communications is sought by stockholders . . . ." *Id.* at 1095. The Fifth Circuit in *Garner* stated that "communications made by a client to his attorney during or before the commission of a crime or fraud for the purpose of being guided or assisted in its commission are not privileged." *Id.* at 1102. The court went on to state that

> [t]he stockholders claim to have been the victims of improprieties in the issuance and sale of [the corporation's] stock. The questions, and the documents sought, concern those alleged improprieties, with particular regard to whether the attorney advised the corporation that proposals it had in mind were not legal and that statements to be put in its prospectus were misleading.

Id. at 1102-1103. The court also stated that the plaintiff stockholders should have been allowed to show good cause as to why the attorney-client privilege should not have been invoked in this instance. When making a determination of good cause, the court cited the following as factors to be considered: (1) the number of stockholders affected and the percentage of stock represented by them;

(2) the good faith of the stockholders; (3) the nature of the stockholders' claim and whether it is obviously colorable; (4) the apparent necessity or desirability of the stockholders having the information and the availability of the information from other sources; (5) whether, if the action alleged of the corporation is wrongful, it is criminal, or illegal but not criminal, or of doubtful legality; (6) whether the communication in question is related to past or prospective action; (7) whether the communication is related to the present litigation; (8) the extent to which the communication in question is identified versus the extent to which the stockholders are blindly fishing for information; and (9) the risk of revelation of the corporation's trade secrets or other confidential information. *Id.* at 1104.

In the case at hand, it is clear that many of these factors do indeed apply. There are a number of plaintiff shareholders, and they at one time held approximately forty percent of Selox stock; they have cited numerous facts which support their claims, and which would overcome any motion for summary judgment at this point; the information they seek is not available from other sources and appears to be extremely relevant and important, if not critical to their claims; the actions allegedly taken by the defendant are of doubtful legality, if not criminal; the specific subject of the communication sought appears to be narrowly defined; and there is no claim that trade secrets of Selox will be disclosed. In the opinion of the undersigned, under these factors, the plaintiffs have made a *Garner* good cause showing that the privilege should not be allowed to stand.

Instructive here is a recent case by the Fifth Circuit, *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988), which likewise considered the availability of the attorney-client privilege. In referring to the *Garner* decision, the *Ward* court stated that The *Garner* court decided to preserve the privilege against shareholder harassment but to suspend it in circumstances where shareholders

'show cause why it should not be invoked in the particular instance'." *Id.* at 735, citing *Garner* at 1104. The *Ward* case involved a suit by shareholders of a corporation who had redeemed their shares three years prior to a sale of that corporation. The *Ward* court stated that it rejected the Ninth Circuit's narrow interpretation that *Garner* applies only to shareholder derivative suits. The Fifth Circuit found that while "a nonderivative suit by shareholders against management actions that necessarily arise from some adverse interest (e.g. disclosures related to a tender offer) presents more problems for finding good cause", it left room for a determination that good cause for suspending the privilege could be found in nonderivative suits. *Id.* at 786. In fact, the court went on to state that where "shareholders seek to recover damages from the corporation for themselves . . . the motivations behind the suit are more suspect, and the more subject to careful scrutiny, in determining if good cause for suspending the privilege exists", *Id.* at 786, clearly supporting the idea that the privilege can be suspended in non-derivative actions.

In this instance, the undersigned finds that the plaintiffs have shown good cause for suspending the privilege, even when subjected to the more stringent scrutiny required by *Ward*. As discussed above, many of the *Garner* factors have been met. In addition, the defendant has allegedly perpetrated many acts which appear to be, on their face, very suspect. He should not now be allowed to hide behind the shield of the attorney-client privilege and thereby prevent the truth surrounding his actions from being discovered.

While the Sixth Circuit has not considered a fact situation which is analogous to the situation at hand, it has analyzed the availability of the attorney-client privilege under the crime-fraud exception. In *In Re. Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986), the court recognized that "[t]he purpose of the attorney-client privilege is to encourage clients to communicate freely and completely

with their attorney .... However, it is not an absolute privilege .... Under some circumstances the privilege is to be very narrowly construed." *Id.* at 162. When analyzing the application of the crime-fraud exception to the privilege, the court confirmed that "[f]irst, the government must make a *prima facie* showing that a sufficiently serious crime or fraud occurred to defeat the privilege; second, the government must establish some relationship between the communication at issue and the *prima facie* violation." *Id.* at 164. The court then held that to meet the *prima facie* standard, there must be a showing that under the facts as alleged, "a prudent person [would] have a reasonable basis to suspect the perpetration of a crime or fraud." *Id.* at 166.

While the facts of *In Re Antitrust* are not analogous to those of this matter, the undersigned believes that the standard required to make a *prima facie* case in the crime-fraud situation is analogous to the good cause standard of *Garner*. And, the undersigned finds that this *prima facie* standard has been met by the plaintiffs here. There is no doubt that the activity of defendant White—specifically, his obtaining releases, his purchase of stock at prices he knew were much lower than the market would pay, and his misrepresentations to his Board of Directors—could lead to a prudent person to suspect the perpetration of a fraud.

The undersigned also finds that the relative duties imposed by law upon the parties in this case are very important. Clearly, the defendant White owed a fiduciary duty to the corporation and its minority shareholders, a duty which should not be taken lightly. As stated in *Johns v. Caldwell*, 607 S.W.2d 37 (Tenn.App. 1980),k

> [i]t is very clear in Tennessee that not only do officers and directors own a fiduciary relationship to the corporation and its shareholders, but it is also clear that a controlling stockholder owes a fiduciary duty to other shareholders. Our courts

> are prompt to redress the injuries to minority stockholders caused by the wrongdoings of majority stockholders.

Id. at 41. (citations omitted). Here, it not only appears that defendant White neglected his duties, but that he blatently [sic] ignored them and took advantage of those he was bound to represent.

It is clear that the acts alleged by the plaintiffs were not only "bad" on the face of such actions but made worse by the fiduciary relationship between defendant White and the plaintiffs. Any injury caused by his actions must be redressed.

Again, the undersigned is mindful of the fact that Selox is not a defendant in this action and no wrongdoing on the part of the corporation has been alleged. However, because the defendant White was acting for both himself and the corporation in his dealings with the attorneys and in the actions he took, and because decisions made under such circumstances are so inexctricably intertwined, it is impossible for the undersigned to distinguish conversations between the defendant and his attorneys which were for personal matters and which were for corporate matters; and the privilege will not be allowed to protect conversations related to either. While this result may seem harsh, it is also the finding of the undersigned that the corporation itself, as represented by the defendant White, also owed and continued to owe duties to its minority shareholders.

Therefore, for the reasons stated above, the undersigned GRANTS the plaintiffs' motion to compel.

SO ORDERED:

/s/ Joe A. Tilson
JOE A TILSON
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

NO. CIV-1-89-185
NO. CIV-1-89-187
NO. CIV-1-89-188
NO. CIV-1-89-287
NO. CIV-1-89-288
NO. CIV-1-89-445
NO. CIV-1-89-446
NO. CIV-1-89-447
NO. CIV-1-89-448

THOMAS A. J. FAUSEK, ET. AL.

ROBERT E. WHITE, ET AL.

FILED

AUG 19 '91

U.S. DISTRICT COURT
EASTERN DISTRICT TENN.

ORDER

This matter is before the Court to consider the objections and appeal of Selox, Inc. and Robert E. White from the order of the Magistrate compelling waiver of attorney-client privilege. After careful review of the objections filed, the response of the plaintiffs, and the record as a while, the Court finds that the Magistrate's order is not clearly erroneous or contrary to law. Rule 72(a) of the Federal Rules of Civil Procedure. Accordingly, it is hereby OR-

DERED that the Magistrate's order is ADOPTED and AFFIRMED.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

United States District Court
Eastern District of Tennessee

CASE NUMBER: 1-89-185
Consolidated cases

Thomas A. J. Fausek, et al.,

Plaintiff,

v.

Robert E. White, et al.,

Defendants.

FILED

JUN 27

U.S. District Court
Eastern District Tenn.

TYPE OF CASE
☒ CIVIL

SUBPOENA FOR
☒ PERSON
☒ DOCUMENT(S) or OBJECT(S)

TO:
Mr. Joel Richardson
Miller & Martin
Suite 1000
Volunteer Building
Chattanooga, Tn 37402

YOU ARE HEREBY COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE
Offices of Miller & Martin
Suite 1000
Volunteer Building
Chattanooga, Tn 37402

DATE AND TIME
July 2, 1990
9:00 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

Described on Exhibit "A" attached.

☐ *Please see additional information on reverse*

Any subpoenaed organization not a party to this suit is hereby admonished pursuant to Rule 30(b)(6), Federal Rules of Civil Procedure, to file a designation with the court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and setting forth, for each person designated, the matters on which he will testify or product documents or things. The persons so designated shall testify as to matters known or reasonably available to the organization.

U.S. MAGISTRATE OR CLERK OF COURT
S. MURRY HAWKINS, CLERK

DATE
JUN 27 1990

(BY) DEPUTY CLERK
[Signature illegible]

This subpoena is issued upon application of the:
☒ Plaintiff

QUESTIONS MAY BE ADDRESSED TO:
Jack D. Kopald
McDonnell Boyd
67 Madison Ave., 12th Fl.
Memphis, Tennessee 38103
(901) 521-1111

RETURN OF SERVICE[1]

RECEIVED BY SERVER:

Date: June 27, 1990
Place: Chattanooga, TN

SERVED:

Date: June 27, 1990
Place: Volunteer Bldg., Chattanooga, TN

SERVED ON (NAME)	FEES TENDERED
Joel Richardson authorized Kim Easton, Receptionist to accept for him	☒ No Amount $____

SERVED BY	TITLE
Ralph R. Armstrong	Attorney

DECLARATION OF SERVER[2]

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on June 27, 1990 /s/ Ralph R. Armstrong
Date Signature of Server

_____
Address of Server

[1] To who may serve a subpoena and the manner of its services see Rule 17(d). Federal Rules of Criminal Procedure, or Rule 45(c). Federal Rules of Civil Procedure.

[2] "Fees and mileage need not be tendered to the deponent upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure, Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (2a USC 1825, Rule 17(b) Federal Rules of Criminal Procedures".

EXHIBIT A

1. All documents within your possession, custody or control relating to or arising out of conversations, prior to April 1, 1988, with Thomas H. Lowe regarding his purchase of Selox stock from any other shareholder or Selox.

2. All documents within your possession, custody or control relating to any engagement for legal services of you or Miller & Martin by Thomas H. Lowe at any time from January 1, 1987 through April 1, 1988.

3. All documents within your possession, custody or control relating to any payment by Thomas H. Lowe for legal services performed by you or by Miller & Martin from January 1, 1987 through April 1, 1988.

4. All documents within your possession, custody or control relating to or arising out of conversations, prior to April 1, 1988, with Robert E. White regarding his purchase of Selox stock from any other shareholder or Selox.

5. All documents within your possession, custody or control relating to any engagement for legal services of you or Miller & Martin by Robert E. White at any time prior to April 1, 1988.

6. All documents within your possession, custody or control relating to any payment by Robert E. White for legal services performed by you or by Miller & Martin prior to April 1, 1988.

7. All documents within your possession, custody or control relating to or arising out of conversations, prior to April 1, 1988, with any one of the following: James B. Frost, James D. Hutcherson, E. Larry Walker, Carl W. Henderson, or E. Ladell McCullough, regarding Robert E. White's or Thomas H. Lowe's purchase of Selox stock from any other shareholder or Selox.

8. All documents within your possession, custody or control relating to any engagement for legal services of you

or Miller & Martin by Selox at any time prior to April 1, 1988.

9. All documents within your possession, custody or control relating to any payment by Selox for legal services performed by you or by Miller & Martin prior to April 1, 1988.

10. All documents within your possession, custody or control relating to the payment of $4,000,000.00 to William White.

11. All documents within your possession, custody or control relating to or arising out of or in connection with Selox's acquisition of treasury stock from any shareholder.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

CIVIL ACTION NO. 1-89-185
(CONSOLIDATED ACTIONS)
JUDGE HULL

THOMAS A. J. FAUSEK, et al.,

Plaintiffs

vs.

ROBERT E. WHITE, et al.,

Defendants.

ORAL ARGUMENT REQUESTED

MOTION TO COMPEL ANSWERS TO QUESTIONS ON ORAL EXAMINATION

Pursuant to agreement and subpoena duces tecum attached hereto, plaintiffs,[1] by and through their counsel of

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[1] Hanover, Walsh, Jalenak & Blair represents Mrs. Oma Lee McKamey; Janice White, Executrix of the Estate of James A. White; Thomas A.J. Fausek; William F. Fausek; Jeanne S. Fausek, Executrix of the Estate of Irving F. Fausek, Jr.; James F. Fausek, Trustee of Irving F. Fausek, Jr. Trust; James F. Fausek and Geneva L. Fausek, Trustees for James F. Fausek; Al V. Fausek; Genevieve Fausek; Camilla and Maynard L. Rinehart; Jean L. Carter; and First Interstate Bank of Arizona, Trustee for Miriam Y. Weidner.

Salivar, Benson, Guest & Harms represents all of the above except Mrs. Oma Lee McKamey and the Estate of James A. White.

McDonnell Boyd represents the Winona National and Savings Bank; Armin M. Elbert and Ruth C. Elbert as trustees for the Elbert Family Trust; Mark A. Elbert; Charles A. Elbert; Nancy J. Elbert; Steven J. Elbert; and, Rosalie C. Elbert.

record in this cause, J. Alan Hanover of Hanover, Walsh, Jalenak & Blair of Memphis, Tennessee; and, Jack D. Kopald of McDonnell Boyd, Memphis, Tennessee commenced the taking of the oral deposition of Joel W. Richardson, Jr., a partner in the law firm of Miller & Martin of Chattanooga, Tennessee, on Monday, July 2, 1990, at 9 a.m. at the law office of Miller & Martin.

During the deposition, the witness, on his own accord and on the advice of his counsel, Raymond R. Murphy, Jr., who is also counsel for the defendant, Robert E. White, in this cause, refused to answer certain questions on the grounds that to answer would cause him to violate a claimed attorney/client privilege between himself and Selox, Inc. ("Selox"), a former client; that to answer would cause him to violate the attorney/client privilege which he claimed exists between himself and the defendant, Robert E. White, in this cause, who was his client at the same time he was representing Selox, and that to answer some of said questions would cause him to violate both privileges.[2]

Plaintiffs' counsel would respectfully show to the Court that all the plaintiffs in this cause are former stockholders of Selox, and that Joel W. Richardson, Jr. and/or Miller & Martin were, during the periods in question, acting as counsel for both Selox and as the personal attorney for the said Robert E. White, who was a major and "controlling" shareholder, director and chief operating officer of Selox. Plaintiffs' counsel would further show that Joel W. Richardson, Jr. and/or Miller & Martin while acting as personal counsel for the defendant, Robert E. White, assisted and gave him legal advice in the acquisition of stock

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[2] These refusals were also applied to a request for the production of certain documents which are set out in what was made Exhibit 456 to the deposition of Mr. Richardson. This exhibit is attached to and made a part of this motion, along with the deposition of Mr. Richardson. See fn.3.

from minority stockholders in the form of treasury stock, which by its acquisition automatically increased the percentage of ownership of the defendant, Robert E. White, and further gave the defendant, Robert E. White, assistance and legal advice so that he could either acquire the stock of Selox in his sole name from minority stockholders or protect himself in regard to stock which he had already acquired by preparing and/or negotiating releases after the fact, while at the same time being counsel for the corporation. Plaintiffs would further show that such attorneys also represented the said Robert E. White in other matters dealing with the stock of Selox or its value, the evidence of which is relevant to the issues in this cause.

A memorandum accompanying this motion shows that under the facts and circumstances of this case, no attorney/client privilege exists as between the former stockholders of Selox and the corporation, nor does any attorney/client privilege exist between Joel W. Richardson, Jr. and/or the law firm of Miller & Martin with Robert E. White as to the matters requested herein.

The questions asked and the refusals of Joel W. Richardson, Jr. to answer are found on the following page numbers of the deposition of Joel W. Richardson, Jr., a copy of which accompanies this motion. (42, 43, 50, 52, 53, 65, 66, 77, 78, 91, 92, 105, 106, 111-116, 118, 119, 129, 130, 131, 133, 144, 167, 168, 179-182, 184-186, 201-203)

The documents which counsel refused to produce are set forth in Exhibit 456 attached hereto. The testimony sought in each instance is either itself relevant to the subject matter involved in this action or is reasonably calculated to lead to the discovery of admissible evidence.[3] It should

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[3] There is also an Exh. 456A which is the same as Exh. 456 exceqpt it will show which privilege or privileges are being asserted by defendant Robert White, Selox or both as to each document refused to be pro-

be noted that the information sought relates to matters arising prior to the commencement of this litigation and prior to the sale of Selox to the BOC Group, Inc. on March 31, 1988.

Plaintiffs, therefore, pursuant to Rule 37(a)(2) of the Federal Rules of Civil Procedure, respectfully move the Court for an order compelling Joel F. Richardson, Jr. to answer in deposition the questions set forth above and any other questions the answers to which would be proper under the rules of discovery and to declare the rights of the parties involved regarding the existence or nonexistence of any attorney/client privilege in this case as it may apply to other witnesses who have claimed these privileges or who may claim them in later depositions or requests for production. Plaintiffs further request that the said Joel W. Richardson, Jr. and/or Miller & Martin be required to produce the documents set forth in Exhibit 456 which have not already been produced.

Plaintiffs further move, pursuant to Rule 37(a)(4) of the Federal Rules of Civil Procedure that they be awarded their costs in seeking this discovery.[4]

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vided. This was to be furnished by agreement with counsel for defendant White and the witness Richardson, but it has not been received as of the filing of this motion. It will be filed with the Court when received.

[4] Counsel wish to call the Court's attention to the fact that the defendants have filed motions for summary judgment, and that the responses of these plaintiffs are due August 2, 1990. Since it is unlikely that the Court will have an opportunity to rule on this motion prior to that time, or if so, and the ruling is favorable to the movants, it is also unlikely that the conclusion of the deposition of Mr. Richardson could be had within the time frame allowed, the movants would request that they be given an opportunity to supplement their responses to the motions for summary judgment, if relevant.

HANOVER, WALSH, JALENAK & BLAIR

By: /s/ J. Alan Hanover
J. Alan Hanover

Attorneys for Plaintiffs
Fifth Floor, Falls Building
22 North Front Street
Memphis, Tennessee 38103-1989
(901) 526-0621

SALIVAR, BENSON, GUEST & HARMS

By: /s/ Joe G. Harms II
Joe G. Harms II

Attorneys for Plaintiffs
635 Maryville Center Drive,
Suite 120
St. Louis, Missouri 63141
(314) 469-7800

MCDONNELL BOYD

By: /s/ Jack D. Kopald
Jack D. Kopald

Attorneys for Plaintiffs
12th Floor
Union Planters Bank Building
67 Madison Avenue
Memphis, Tennessee 38103
(901) 521-1111

CERTIFICATION IN ACCORDANCE WITH E.D. TENN. L.R.'S 10.3 AND 11.4

I. J. Alan Hanover, counsel for the plaintiffs hereby certify that I have attempted to resolve this dispute with Raymond R. Murphy, Jr., counsel for defendant, Robert E. White, and the witness, Joel W. Richardson, Jr., during the taking of the deposition of Mr. Richardson on July 2,

1990. Mr. Murphy instructed Mr. Richardson not to answer even though, I, as counsel for the plaintiffs, stated that this motion would be filed.

/s/ J. Alan Hanover
J. Alan Hanover

Certificate of Service

I hereby certify that a true and correct copy of the foregoing document was served, via U.S. Mail, postage prepaid, this 26th day of July, 1990, upon the attorneys listed on the following service list:

Roger W. Dickson, Esq.
Caldwell, Heggie & Helton
1800 Republic Centre
633 Chestnut Street
Chattanooga, TN 37450-1800

Gary D. Lander, Esq.
David R. Evans, Esq.
Chambliss & Bahner
1000 Tallan Building
Two Union Square
Chattanooga, TN 37402

R. Dee Hobbs, Esq.
833 B Chestnut
Chattanooga, TN 37450

George L. Foster, Esq.
Hall, Haynes, Lusk & Foster
515 Pioneer Building
Chattanooga, TN 37402

Allan Horwich, Esq.
Jon Margolies, Esq.
Shiff, Hardin & Waite
7200 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

Raymond R. Murphy, Jr., Esq.
W. Randall Wilson, Esq.
Miller & Martin
1000 Volunteer Building
Chattanooga, TN 37402

Lee J. Chase III, Esq.
William L. Bomar, Esq.
Glankler, Brown, Gilliland, Chase, Robinson & Raines
1700 One Commerce Square
Memphis, TN 38103

/s/ J. Alan Hanover
J. Alan Hanover

EXHIBIT 456

INDEX OF NUMBERED DOCUMENTS WITHHELD FROM PRODUCTION FROM THE FILES OF ROBERT E. WHITE PERTAINING TO THE REQUEST FOR PRODUCTION IN FAUSEK, et al. v. WHITE, et al.

CONSOLIDATED CASES — Civil No. 1-89-185

Number	Description of Document	Basis for Withholding From Production
0709	3/3/89 Memo from Joel Richardson to R. Murphy re: U.S. Fiduciary income tax return attached	Work product privilege
0852-0860	1/13/86 letter from Joel W. Richardson, Jr. to REW re: Selox—Jay E. Tinker; aquisition of stock held by trust department	Attorney-client privilege—not responsive
1943-1945	5/4/88 letter from Joel Richardson to REW re: 5/3/88 invoice—Billing	Attorney-client privilege—not responsive
1962-1964	4/22/88 letter from Joel Richardson to REW re: The BOC Group, Inc./Selox, Inc. Acquisition, request to delay completion of plant	Attorney-client privilege—not responsive

1993-1997	1/12/88 letter from Joe Richardson to Henderson, Hutcherson, Walker & McCullough re: Selex and Subsidiaries	Not responsive
1998-2000	12/29/87 letter from Joel Richardson to Thomas H. Lowe re: General, 11/87 statement—Billing	Attorney-client privilege—not responsive
2001-2003	12/29/87 letter from Joel Richardson to Thomas H. Lowe re: AAP, 11/87 statement—Billing	Attorney-client privilege—not responsive
2004-2006	12/29/87 letter from Joel Richardson to Thomas H. Lowe re: Labor, 11/87 statement—Billing	Attorney-client privilege—not responsive
2007-2008	12/11/87 letter from Joel Richardson to Thomas H. Lowe re: Labor, 9/87 through 10/87 statement—Billing	Attorney-client privilege—not responsive
2009-2010	12/11/87 letter from Joel Richardson to Thomas H. Lowe re: General, 10/87 statement—Billing	Attorney-client privilege—not responsive
2011-2012	12/11/87 letter from Joel Richardson to Thomas H. Lowe re: General, 9/87 through 10/87 statement—Billing	Attorney-client privilege—not responsive
2013-2014	12/11/87 letter from Joel Richardson to Thomas H. Lowe re: General, 9/87 through 10/87 statement—Billing	Attorney-client privilege—not responsive

2015-2016	12/11/87 letter from Joel Richardson to Thomas H. Lowe re: AAP, 8/87 through 10/87 statement—Billing	Attorney-client privilege—not responsive
2017-2019	8/18/87 letter from Joel Richardson to REW re: CE Refractories Division of CE, enforcement of Gas Service Agreement	Attorney-client privilege, work product privilege, not responsive
2020-2021	7/7/87 letter from Joel Richardson to Herb Rudolph, MG Industries re: CE Refractories Division of CE	Not responsive
2022-2023	8/12/87 letter from Joel Richardson to Thomas H. Lowe re: Selox Class B. Common Stock and Northwestern National Life Ins. Co. Warrants	Attorney-client privilege—not responsive
2024-2025	8/8/87 letter from Joel Richardson to Paul J. Bethune, Selox re: Polygraph Exam, application fee to cover fee	Attorney-client privilege—not responsive
2026-2027	8/7/87 letter from Joel Richardson to Thomas H. Lowe re: Labor, 1/87 through 5/87 statement—Billing	Attorney-client privilege—not responsive
2028-2029	8/6/87 letter from Joel Richardson to Thomas H. Lowe re: Selox of Alabama, 1/87 through 5/87 statement—Billing	Attorney-client privilege—not responsive
2030-2031	8/6/87 letter from Joel Richardson to Thomas H. Lowe re: Southeastern Management Corp., 1/87 through 5/87 statement—Billing	Attorney-client privilege—not responsive

2032-2033	8/7/87 letter from Joel Richardson to Thomas H. Lowe re: National Carbonic, Inc.; 4/87 through 5/87 statement—Billing	Attorney-client privilege—not responsive
2034-2035	8/7/87 letter from Joel Richardson to Thomas H. Lowe re: Selox, 1/87 through 5/87 statement—Billing	Attorney-client privilege—not responsive
2036-2037	8/7/87 letter from Joel Richardson to Thomas H. Lowe re: Selox Energy, Inc.; 1/87 through 5/87 statement—Billing	Attorney-client privilege—not responsive
2038	4/14/87 letter from A. Alexander Taylor, II to Herbert Sparks re: Selox Energy Corp. and Oil Equipment Associates—Mammouth Petroleum	Attorney-client privilege—not responsive
2039-2040	1/5/87 letter from Joel Richardson to Thomas H. Lowe re: IGL Transport and Selox Energy, liability for negligent acts of subsidiaries	Attorney-client privilege, work product privilege, not responsive
2041-2043	3/30/87 letter from Joel Richardson to James A. Samples, Selox re: Carbon Dioxide Sale and Purchase Contract between Shell and Selox	Attorney-client privilege—not responsive
2044-2049	1/23/87 letter from Joel Richardson to Thomas H. Lowe re: Selox, Selox of Alabama and Selox Energy 12/86 statements—Billing	Attorney-client privilege—not responsive

2050-2051	10/28/86 letter from Joel Richardson to Thomas H. Lowe re: 7.89 % Cumulative Preferred Stock, payment of dividends and redemption	Attorney-client privilege—not responsive
2052-2053	3/24/86 letter from Joel Richardson to Tay E. Tinker, First Interstate Bank of Arizona, N.A. re: acquisition of stock	Not responsive
2054-2059	4/5/85 letter from Joel Richardson to H.W. Feagans re: Form of Monthly Statement and/or Invoice	Not responsive
2060-2072	4/5/85 letter from Joel Richardson to Bill J. Hillis re: Selox—Bulk Service Agreement	Not responsive
2073-2078	4/1/85 letter from Joel Richardson to H.W. Feagans, Jr., re: Form of Monthly Statement and/or Invoice	Not responsive
2079-2984	4/1/85 letter from Joel Richardson to Bill J. Hillis re: Cylinder Service Agreement	Not responsive
2085-2096	4/1/85 letter from Joel Richardson to Bill J. Hillis re: Bulk Service Agreement	Not responsive
2097-2115	4/24/85 letter from Joel Richardson to Bill J. Hillis re: Bulk Service Agreement	Not responsive
2116-2122	6/4/85 letter from Joel Richardson to REW re: Non-Competition Agreements	Attorney-client privilege—not responsive

2123	2/13/85 letter from Joel Richardson to REW re: Statements to Selox, Inc. and Selox of Alabama, Inc. for 4/84 through 11/84 and IGL Transport, Inc. organization—Billings	Attorney-client privilege—not responsive
2124	Handwritten note by REW, have Joe Richardson review case and find out opinion	Attorney-client privilege—not responsive
2125-2126	10/9/84 letter from W. Ferber Tracy to H.W. Feagans, Jr. re: George Kilgore and Emma Kilgore v. Selox	Not responsive
2127-2130	1/16/87 letter from Joel Richardson to REW re: Specialized Leasing Co., amendment to general partnership agreement	Attorney-client privilege—not responsive
2131	1/17/85 letter from Joel Richardson to Bill Bacon, Bacon Well Drilling re: Well for Selox	Not responsive
2190	4/10/85 letter from Joel Richardson to REW re: Minutes of 4/2/85 special board meeting and By-Laws	Attorney-client privilege—not responsive
2249-2252	3/18/88 letter from Joel Richardson to Stewart Jenkins, Stewart & Grantham re: REW pledge of stock to W.M. White	Not responsive
2253-2310	2/29/88 letter from Joel Richardson to Stewart Jenkins re: W.M. White claim against REW	Not responsive

2488	2/28/85 letter from Joel Richardson to REW re: William M. White	Attorney-client privilege, work prduct privilege, not responsive
2499-2517	2/10/86 letter from Joel Richardson to REW re: Selox, Inc.—William M. White; Memorandum of Sale, Promissory Note	Attorney-client privilege—not responsive
2546-2552	Agreement and Covenant Not to Sue	Not responsive
2559	12/17/83 letter from Irwing F. Fausek, Jr. regarding 10/31/83 letter	Not responsive
2560-2561	8/27/81 Security Agreement between REW and WMW	Not responsive
2792-2795	5/1/86 letter from Joel Richardson to T. H. Lowe re: Resignation by Trustee and Appointment of Successor Trustee	Attorney-client privilege
2796	5/1/86 letter from Joel Richardson to REW re: Acquisition of J. A. White stock	Attorney-client privilege
2797-2807	Employment Agreement, J. A. White	Attorney-client privilege
2808-2832	4/10/86 letter from Joel Richardson to REW re: Memorandum of Sale, Promissory, Pledge Agreement	Attorney-client privilege

2833-2835	Memorandum of Sale	Attorney-client privilege
2836-2838	Promissory Note	Attorney-client privilege
2839	Pledge Agreement	Attorney-client privilege
2840-2854	Pledge Agreement	Attorney-client privilege
2855	3/27/86 letter from FEW to Joe Richardson re: breakdown of stock shares	Attorney-client privilege
2856-2863	4/1/86 letter from Joel Richardson to Alan L. Cates re: Memorandum of Sale, Memorandum of Sale	Attorney-client privilege
2864-2870	3/10/86 letter from Joel Richardson to REW re: 3/10/86 Memorandum to file of Selox	Attorney-client privilege
2871-2903A	2/13/86 letter from Joel Richardson to Alan L. Cates re: Memorandum of Sale, Promissory Note, Pledge Agreement, Employment Agreement	Attorney-client privilege
2904-2932	2/11/86 letter from Joel Richardson to REW re: Promissory Note, Pledge Agreement, Employment Agreement	Attorney-client privilege
2933-2963	2/3/86 letter from Joel Richardson to REW re: Promissory Note, Pledge Agreement, Employment Agreement	Attorney-client privilege

2964-2996	1/27/86 letter from Joel Richardson to REW re: Memorandum of Sale, Pledge Agreement, Employment Agreement	Attorney-client privilege
4212-4213	3/31/87 Financial Statement, Robert E. White, II and Karla White	Not responsive
4214-4215	3/31/87 Financial Statement, James Samples and Debra Samples	Not responsive
4216-4217	10/1/86 Financial Statement, James Samples	Not responsive
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6155	1986 Federal Income Tax Statements, Page 10	Not responsive
6156	1985 Form 1040	Not responsive
6158	1984 Federal Income Tax Statements	Not responsive
	1984 Federal Income Tax Statements	Not responsive
6171	1983 Federal Income Tax Statements	Not responsive
6173	1982 Federal Income Tax Statements	Not responsive
6176	1986 Amended Federal Income Tax Statements	Not responsive

6180	1985 Amended Federal Income Tax Statements	Not responsive
6183	1984 Amended Federal Income Tax Statements	Not responsive
6185	1983 Amended Federal Income Tax Statements	Not responsive
6187	1982 Amended Federal Income Tax Statements	Not responsive
6550	3/87 memo; contribution for campaign of Gene Roberts—Mr. Hobb picked up $1000	Not responsive
6551-6553	4/15/88 letter from Henderson, Hutcherson, Walter & McCullough To REW re: Application for Automatic Extension of Time to File Income Tax Return	Not responsive
6554-6556	2/7/87 memo from Carl to REW re: IRS Notices 1978 and 1981	Not responsive
6557	3/17/67 Promissory Note; $33,500; REW to pay Mrs. Henry L. White	Not responsive
6558-6559	8/21/86 letter from Carl W. Henderson to REW re: 8/16/86 Joint Tax Committee legislation	Not responsive
6560-6574	12/16/86 letter from James D. Hutcherson to REW re: enclosed income tax analysis from 1986, 1987 and 1988	Not responsive
6575	1/9/86 copies of check stubs, written to IRS	Not responsive

6576	IG Leasing Checkbook analysis for 1986	Not responsive
6579	Handwritten note, Bob sign form W-3 and date and mail	Not responsive
6580	Handwritten note, Bob, please sign and date and mail	Not responsive
6581	NCNB National Bank of NC Advice of Loan Interest Paid 1986	Not responsive
6582-6587	NCNB Loan Interest and Principal Notices, 12/15/86, 10/15/86, 9/15/86, 8/31/86	Not responsive
6588	Handwritten note, please sign and date and mail	Not responsive
6593-6598	9/30/86 ANB, Trustee for Selox Profit Sharing Plan, REW summary	Not responsive
6599	Statement info., Donnie	Not responsive
6600	Handwritten note, Bob sign form and date and mail	Not responsive
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No. 92-708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SELOX, INC.,

Petitioner,

vs.

THOMAS A.J. FAUSEK, *et al.*,

Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Has Selox waived the attorney-client privilege by voluntarily producing the documents as to which the privilege was claimed?

2. Did the Sixth Circuit err in applying the principles of *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971), when it affirmed the district court's order compelling oral testimony and the production of documents in a discovery deposition?

3. Did Selox establish that the communications were privileged in the first instance?

STATEMENT OF CORPORATE AFFILIATIONS

Respondent Winona National and Savings Bank, Executor of the Will of Robert E. Maxwell, is a wholly owned subsidiary of Winona National Holding Company, a privately held Minnesota corporation.

Respondent First Interstate Bank of Arizona, N.A., is a wholly owned subsidiary of First Interstate Bancorp, a publicly owned California corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-708

SELOX, INC.,

Petitioner,

VS.

THOMAS A.J. FAUSEK, *et al.*,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

RULE INVOLVED

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books,

documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

STATEMENT OF CASE

Petitioner seeks review of issues which arise out of a discovery dispute and an order compelling discovery against a claim of attorney-client privilege. There has been no trial, verdict or judgment in the district court.

Plaintiffs/Respondents are the former owners of forty percent of the shares of Selox, Inc., a closely-

held manufacturer of industrial gas. Plaintiffs sold their shares for $11 or $15 per share to Selox or to defendant Robert E. White, Selox's chief executive officer and controlling shareholder, who immediately thereafter sold the same shares for approximately $168 per share. Plaintiffs' complaints against defendant White, other corporate insiders and the alleged independent accountants for Selox state various claims under state and federal law, based on allegations that defendant White and others pursued a scheme to squeeze out minority stockholders and to gain control of Selox for their personal profit, and that they did so through wilful misrepresentations and undisclosed, insider information.[1]

In the course of discovery, plaintiffs, pursuant to a subpoena *duces tecum* (App. 30a[2]), deposed Joel W. Richardson, a partner in the Chattanooga, Tennessee, law firm of Miller & Martin, whose firm counseled defendant White and Selox during the alleged fraudulent activities. (It has not yet been established to what extent Mr. Richardson participated in, knew or suspected that his clients were engaged in a massive

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[1] In February and March 1992, while Selox's appeal was pending in the Court of Appeals, two new actions were filed in the United States District Court for the Eastern District of Tennessee naming Selox as the sole defendant. These collective actions were brought by all the named plaintiffs except the Elbert family, and also assert claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 *et seq.*, and various state common law claims for fraud and misrepresentation. The district judge consolidated the two new cases with the ten original cases. Selox is now attempting to appeal the consolidation order to the Sixth Circuit.

[2] All references to "App." are to the appendix contained in Selox's petition for a writ of certiorari.

fraud.) Mr. Richardson refused to answer a number of questions, claiming the privilege on behalf of Selox, defendant White, or both. Plaintiffs moved to compel him to testify and to produce the requested documents. (App. 35a)

The district court referred the matter to the magistrate judge, who considered the record, the briefs and the oral argument of counsel. Because defendant White was acting for both himself and the corporation in his dealings with Mr. Richardson, the magistrate judge held it was impossible to distinguish conversations which were for personal matters from those which were solely for corporate matters. (App. 27a) Further, because both defendant White and the corporation were buying plaintiffs' stock, all under the direction and control of defendant White, the magistrate judge held that the privilege could not apply to either. (App. 27a) The magistrate judge based his holding on the good cause exception set forth in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971), and the crime-fraud exception described in *In re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986).

Both Selox and defendant White filed objections to the magistrate judge's decision, and the district court affirmed. (App. 28a) Thereafter, Selox alone appealed, and the Sixth Circuit also affirmed.[3] The Sixth Circuit entered its mandate on August 18, 1992 (App. 15a), and Selox did not seek a stay. Consequently, on October 8-9 and 19-21, 1992, plaintiffs' counsel reviewed

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[3] Because defendant White did not appeal, the abrogation of his personal privilege is not in issue.

documents, which were produced by Miller & Martin, with full knowledge of Selox, pursuant to the subpoena *duces tecum* to Mr. Richardson. Although there remains a dispute between plaintiffs and Selox as to the scope of the subpoena, Miller & Martin did produce for plaintiffs' inspection and copying all of the documents listed on exhibit 456 to Mr. Richardson's deposition. (App. 42a)

In essence, plaintiffs allege, and there is substantial proof in the record,[4] that beginning in 1980 defendant White and others, acting personally and on behalf of Selox, set in motion a scheme whereby defendant White and Selox would acquire all of Selox's outstanding shares for prices far below what they knew outsiders were willing to pay. Thereafter, defendant White sold those same shares to BOC Group, Inc., Selox's current owner, for more than ten times the amount he and Selox had paid plaintiffs. Only defendant White and his co-conspirators knew that BOC had been interested in acquiring Selox since around 1980.

Defendants accomplished this plan to squeeze out Selox's minority shareholders with various manipulative and deceptive devices which misled plaintiffs as to the actual value of their shares and as to defendant White's actual intentions with regard to Selox. In furtherance of this scheme, beginning in 1980, defendant White caused this closely-held corporation to cease paying dividends under the guise that Selox was financially unable to pay. At the same time, defendant White consistently maintained that he

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[4] The district judge denied the defendants' (in the ten original cases) various motions for summary judgment.

would never sell the company and that he intended to pass the company on to his children. Therefore, in the absence of either dividends or a public market for their stock, plaintiffs' only opportunity for economic benefit was to sell their stock to defendant White or to Selox for whatever price defendant White, who controlled Selox, was willing to pay.

In fact, the company's financial statements were false, and any real lack of cash flow was caused by defendant White's exorbitant salary and perquisites, his appropriation of corporate opportunities, and his shifting of his personal expenses to Selox. Also concealed from plaintiffs was the fact that nearly every major industrial gas company had contacted defendant White to inquire as to his interest in selling Selox. Once defendant White and Selox acquired the minority shareholders' stock, at $11 or $15 per share, defendant White immediately sold Selox to one of the very companies that had been pursuing him since 1980.

Beginning in 1984, Mr. Richardson represented both defendant White and Selox, and was involved, innocently or otherwise, in defendant White's appropriation of corporate opportunities and self-dealing, the concealment of information from minority stockholders, the purchase of stock from plaintiffs and obtaining releases from them long after the fact. It is in these areas that plaintiffs are entitled to discover Mr. Richardson's knowledge of defendant White's wrongdoing.

SUMMARY OF ARGUMENT

This is not a case that warrants certiorari review.

First, Selox has waived the attorney-client privilege with respect to the matters which it alleges are in issue. Selox states that the only matters of evidence at issue are the documents listed in exhibit 456 (App. 42a) and three areas of oral testimony. After the Sixth Circuit entered its judgment, Miller & Martin, with Selox's concurrence, produced to plaintiffs numerous documents, including all those listed in exhibit 456. The documents contain privileged communications in all areas Selox claims are at issue. Selox has therefore waived the privilege with respect to the exhibit 456 documents and with respect to the areas of oral testimony it claims are at issue. The questions raised in Selox's petition are therefore moot.

Second, there is no conflict among the circuits regarding the "good cause" exception to the corporate attorney-client privilege set forth in *Garner*. Neither Selox nor any circuit court disagrees with the "good cause" exception of *Garner*. Instead, Selox complains that the Sixth Circuit erred in its application of *Garner* to the facts in this case. In the absence of any conflict among the circuits, review by this Court on certiorari is unwarranted. Nor is certiorari review warranted to simply address the application of settled principles to a particular set of facts.

Third, contrary to Selox's assertion, the Sixth Circuit properly applied Tennessee law concerning the fiduciary duties of officers, directors and controlling shareholders of a corporation to their shareholders. Selox concedes that generally officers, directors and controlling shareholders owe a fiduciary duty to mi-

nority shareholders. Selox argues over the scope of those duties, and even if Selox is correct with respect to Tennessee law, the Sixth Circuit properly applied the *Garner* good cause exception, because good cause does not turn on any precise formulation of Selox's and defendant White's fiduciary duties to the minority shareholders.

Fourth, the Sixth Circuit did not reverse the burden of asserting the attorney-client privilege. Instead, the Sixth Circuit assumed that Selox had established the existence of the privilege, and held that the plaintiffs had demonstrated good cause under *Garner* to avoid the privilege.

Finally, the Sixth Circuit's decision is equally supportable on two independent grounds. First, Selox made a blanket claim of the attorney-client privilege without ever establishing the elements necessary to make the privilege apply. In addition, the communications for which Selox sought protection involved the commission of a crime or fraud and are therefore not subject to the privilege.

REASONS FOR DENYING THE PETITION

I. THE ISSUES RAISED IN THE PETITION ARE MOOT

As framed by Selox's petition, the only matters of evidence in issue are the documents listed in exhibit 456 (App. 42a) and the three areas of testimony listed on page 5 of its petition.[5] Assuming Selox is correct, then it has waived the attorney-client privilege, and the issues raised in Selox's petition are moot.

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[5] Plaintiffs do not accept Selox's description of the scope of the subpoena or the motion to compel; however, plaintiffs believe

On October 8-9 and 19-21, 1992, with Selox's knowledge and concurrence, Miller & Martin produced and counsel for plaintiffs reviewed numerous documents, including all of those listed on exhibit 456. The documents contain privileged communications relating to all three areas of oral testimony which Selox contends are at issue.

Having knowingly and voluntarily produced the exhibit 456 documents, Selox can no longer assert a privilege as to those documents. *See, e.g., In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1369 (D.C. Cir. 1984) (citations omitted) ("[A]ny voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege."). Furthermore, voluntary disclosure of the content of a privileged attorney-client communication constitutes waiver of the privilege as to all other communications on the same subject. *E.g., In re Sealed Case*, 877 F.2d 976, 980-1 (D.C. Cir. 1989). Having produced documents containing privileged communications in all relevant areas, Selox has waived the privilege as to all matters which it asserts are at issue, and therefore the issues raised in the petition are moot.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

A.

Contrary to the position asserted by Selox, there is no conflict among the circuits regarding the "good cause" exception to the corporate attorney-client priv-

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that for the purpose of considering whether the issues raised by the petition are moot, Selox should be bound by its own, overly-narrow description.

ilege set forth in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971). The Fifth Circuit in *Garner* recognized an exception to the attorney-client privilege in the context of litigation involving a corporation and its shareholders. The court held that the availability of the privilege to a corporation is subject to the right of the stockholders to show cause why the privilege should not be invoked in the particular instance. 430 F.2d at 1103-4. No circuit court has rejected *Garner*'s good cause exception.

Selox argues that certiorari review by this Court is necessary because the lower courts have applied or not applied the exception to differing fact situations. That is the essence of Selox's complaint about the ruling of the Sixth Circuit—that the good cause exception should not have been applied in the facts of this case.[6] Neither Selox nor any circuit court attacks or disagrees with the principle of *Garner*'s good cause exception. The argument is simply about application. In the absence of a real conflict as to the principle of *Garner*, review by this Court on certiorari is not warranted.

In *Garner* stockholders of First American Life Insurance Company of Alabama (FAL) brought a class action alleging securities fraud and seeking to recover the purchase price they and others had paid for their stock in FAL. The defendants were FAL and various of its directors, officers and controlling persons. The plaintiffs also claimed FAL was itself damaged by the

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[6] In the lead-in to its summary of argument (p. 7), Selox contends that the Sixth Circuit "erred in its application of *Garner* . . . ."

alleged fraud, and they asserted a derivative action against various individual defendants. Plaintiffs deposed, and sought documents from, the attorney who advised FAL in connection with the issuance of its stock. The attorney and FAL asserted the attorney-client privilege and refused to reveal communications and advice between FAL and the attorney. *Id.* at 1095-6.

While acknowledging that the attorney-client privilege had application to the corporate client, the Fifth Circuit considered the assertion of the privilege in a "particularized context:"

> where the client asserting the privilege is an entity which in the performance of its functions acts wholly or partly in the interests of others, and those others, or some of them, seek access to the subject matter of the communications.

Id. at 1101. The court rejected the lower court's holding that the privilege was totally unavailable against the stockholders, and rejected the other extreme position that the privilege was inflexibly absolute. *Id.* at 1097. Instead, the Fifth Circuit remanded the case for a determination whether the stockholders could show good cause why the privilege should not be invoked in the particular circumstances of the case. Regarding the good cause determination, the court said:

> There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders;

> the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Id. at 1104.

In deciding the case below, the Sixth Circuit specifically agreed with the rationale of *Garner* and adopted its holding. (App. 8a) While Selox seems to question the integrity of the court and complains that the opinion does not cover point-by-point every factual consideration, the Sixth Circuit stated it examined each of the transactions as to which plaintiffs sought evidence, and found, upon application of *Garner*'s non-exclusive list of good cause indicia, that plaintiffs had established good cause for not permitting Selox to rely on the privilege. (App. 13a) Neither explicitly nor implicitly does the Sixth Circuit disagree with *Garner*. Rather, the Sixth Circuit applied *Garner* and correctly found that plaintiffs had shown good cause why the privilege should not apply.

B.

Selox had argued to the Sixth Circuit that *Garner* applies only in shareholder derivative actions. While *Garner* itself rejected such a limitation, *id.* at 1097 n.11, the Sixth Circuit acknowledged that Selox's contention finds "support" in *Weil v. Investment/Indicators Research & Management, Inc.*, 647 F.2d 18 (9th Cir. 1981). (App. 8a) The Ninth Circuit in *Weil* does not, however, disagree with *Garner*, nor does it "specifically hold," as Selox argues, that the good cause exception applies only in shareholder derivative actions. Rather, the Ninth Circuit stated, in a passage conveniently omitted from Selox's petition, "Without passing on the merits of *Garner*, we find it inapposite to the case before us." *Id.* at 23. The Ninth Circuit went on to hold that the privilege at issue had been waived, *id.* at 25, so that its earlier comments about inapplicability of *Garner* were dicta in any event.

The Sixth Circuit did not disagree with the actual holding of *Weil*; instead, the court simply stated that to the extent *Weil* holds that the attorney-client privilege of a corporation is absolute in a case brought by individual shareholders in their own right (the position urged by Selox but not actually held in *Weil*), the court rejected that position, as did the Fifth Circuit in *Garner*. (App. 8a)

Nor does the Sixth Circuit's decision conflict with *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988). In its petition (p. 7), Selox states that the Fifth Circuit in *Ward* "suggested" that the application of *Garner* be limited to derivative or quasi-derivative actions. Selox also states (p. 10) that the *Ward* court "specifically rejected" the application of

Garner to litigation that was neither derivative nor quasi-derivative in nature. Neither statement is accurate. The Fifth Circuit simply noted that where the shareholders seek to recover damages from the corporation for only themselves, the motivations behind the suit are more suspect, and thus more subject to careful scrutiny in determining if good cause for suspending the privilege exists. *Id.* at 786. The *Ward* court went on to apply the *Garner* criteria and found that the plaintiffs had not shown good cause in the situation before it. *Id.* at 786-7. Neither "specifically" nor by "suggestion" did the Fifth Circuit limit *Garner* as argued by Selox.

Thus, while Selox strains to find a conflict among the Fifth, Sixth and Ninth Circuits, there is none. Rather, the differences are factual. The major factual distinction between this case and the cases cited by Selox is Mr. Richardson's dual, simultaneous representation of the corporation and a controlling stockholder, while that stockholder was engaged in a fraudulent scheme to squeeze out the minority stockholders. The following passage from the opinion of the magistrate judge highlights this difference:

> [B]ecause the defendant White was acting for both himself and the corporation in his dealings with the attorneys and in the actions he took, and because decisions made under such circumstances are so inextricably intertwined, it is impossible for the undersigned to distinguish conversations between the defendant and his attorneys which were for personal matters and which were for corporate matters; and the privilege will not be

allowed to protect conversations related to either.

(App. 27a) The Sixth Circuit's opinion is merely another application of *Garner* to a different fact pattern; it is not a break with principles followed by other circuits.

III. THERE IS NO CONFLICT WITH OR MISAPPLICATION OF LOCAL LAW

While acknowledging that officers and directors of corporations generally owe fiduciary duties to their shareholders, Selox contends that the Sixth Circuit erred in its application of *Garner* because, according to Selox, Tennessee imposes no fiduciary obligation on officers, directors and controlling shareholders when they buy stock from outside, minority shareholders. Even if Selox is correct as to Tennessee law (which it is not), the question remains one of application of *Garner*, which does not turn on the precise boundaries of Selox's and defendant White's fiduciary obligations to the minority shareholders. Selox acknowledges the general existence of those duties, and that is sufficient for application of *Garner's* good cause test. Even incorrect application of *Garner* does not warrant certiorari review.

Furthermore, Selox must strain to create the conflict which it asserts gives rise to an issue suitable for certiorari review. The Tennessee case on which Selox relies to create this conflict is *Vance v. Schulder*, 547 S.W.2d 927 (Tenn. 1977), a case in which the question before the court was what statute of limitations to apply, not whether a fiduciary obligation exists in a context similar to the case at bar. Selox then misreads the case and seeks to elevate an am-

biguous statement in *Vance* to the position of settled Tennessee law.

The court in *Vance* held that the gravamen of the plaintiff's case was fraud in the inducement of a contract, the common law action of deceit, and that he sought damages resulting from his selling his stock at too low a price. *Id.* at 931. The court stated that the plaintiff could elect between two remedies—he may treat the contract as voidable and sue for rescission or he may treat the contract as existing and sue for damages under the theory of deceit. *Id.* at 931. The latter is grounded in tort and controlled by Tennessee's three-year statute of limitation for actions for injury to personal property. *Id.* at 931-3.

The Tennessee court did not, as contended by Selox, "explicitly reject" the view that officers, directors and controlling shareholders owe fiduciary duties to minority shareholders. That was not even an issue in the case, because the gravamen of the plaintiff's case was deceit, not breach of fiduciary duties. *Id.* at 931. The issue before the court was whether the injury alleged was injury to "personal or real property" under the three-year statute, and the court held it was.

Selox relies on dictum in which the Tennessee court says the case before it was not the "typical" situation where corporate insiders are trading stock with general stockholders. *Id.* at 931. That is not the situation in the case at bar either, because here plaintiffs allege, and have developed substantial evidence in discovery, that Selox, defendant White and others were engaged in a fraudulent scheme to squeeze out the minority shareholders of a closely-held corporation. This is no simple case of management trading in stock on inside information.

To the extent that the Sixth Circuit ruled that Selox and defendant White owed fiduciary duties to the plaintiffs, the court did not conflict with or misapply any clear Tennessee decision. In fact, the cases relied on by the Sixth Circuit more clearly state that the fiduciary duty exists. *Dale v. Thomas H. Temple Co.*, 186 Tenn. 69, 86-7, 208 S.W.2d 344, 352 (1948); *Johns v. Caldwell*, 607 S.W.2d 37 (Tenn. App.), *cert. denied* (1980) (officers, directors and controlling shareholders owe a fiduciary relationship to other shareholders; in buying or selling stock, directors may trade like an outsider, provided they do not affirmatively act or speak wrongfully, or intentionally conceal facts). This is precisely what plaintiffs assert, and the facts support. Selox and defendant White made affirmative misrepresentations and fraudulent omissions in buying plaintiffs' stock.

IV. THE SIXTH CIRCUIT CORRECTLY ALLOCATED TO SELOX THE BURDEN OF ESTABLISHING THE PRIVILEGE

Selox argues that somehow the Sixth Circuit improperly shifted to Selox the burden of establishing the applicability of the attorney-client privilege. On this point Selox is confused, because the party asserting the privilege always has that burden.

Every circuit holds that the party asserting the attorney-client privilege bears the burden of demonstrating that the privilege applies. *See, e.g., In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450 (6th Cir. 1983), *cert. denied sub nom. Durant v. United States*, 467 U.S. 1246, 104 S.Ct. 3524, 82 L.Ed.2d 831 (1984) ("The burden of establishing the existence of the privilege rests with the person asserting it."); *United States v. Bay State Ambulance*

and Hospital Rental Service, Inc., 874 F.2d 20, 28 (1st Cir. 1989) ("The burden of proving the existence of the privilege is on the party asserting the privilege."); *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989) ("The burden of establishing the attorney-client privilege, in all its elements, always rests upon the person asserting it."); *In the Matter of Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F.2d 469, 474 (3d Cir. 1979) (citation omitted) ("The burden of proving that the [attorney-client] privilege applies is placed upon the party asserting the privilege."); *United States v. Tedder*, 801 F.2d 1437,1441 (4th Cir. 1986), *cert. denied*, 480 U.S. 938, 107 S.Ct. 1585, 94 L.Ed.2d 775 (1987) ("[T]he proponent of the privilege . . . must prove its applicability."); *United States v. Rodriguez*, 948 F.2d 914, 916 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2970, 119 L.Ed.2d 590 (1992) ("The burden of establishing privilege rests on the party who invokes it."); *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) ("The burden falls on the party seeking to invoke the privilege to establish all the essential elements."); *Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985), *cert. denied*, 475 U.S. 1119, 106 S.Ct. 1635, 90 L.Ed.2d 181 (1986) ("Initially, we note that the party who claims the benefit of the attorney-client privilege has the burden of establishing the right to invoke its protection."); *Dole v. Milonas*, 889 F.2d 885, 889 (9th Cir. 1989) ("And the party asserting the privilege has the burden of showing that it applies in the circumstances."); *United States v. Bump*, 605 F.2d 548, 551 (10th Cir. 1979) ("The burden of proving a communication is privileged is upon the person asserting the privilege."); *United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir.), *cert. denied*,

___ U.S. ___ , 112 S.Ct. 640, 116 L.Ed.2d 3417 (1991) ("The party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential."); *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) ("It remains the claimant's burden, however, to present to the court sufficient facts to establish the privilege. . . .").

The attorney-client privilege exists "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in observance of the law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d. 584 (1981). However, because the privilege is an obstacle to the investigation of the truth, "[i]t ought to be strictly confined within the narrowest possible limits, consistent with the logic of its principle." *Garner*, 430 F.2d at 1100-01 (quoting 8 Wigmore, Evidence, § 2291 at 554); *accord Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976) ("[S]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose."); *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d at 451; *Prichard v. United States*, 181 F.2d 326, 328 (6th Cir.), *aff'd per curiam*, 339 U.S. 974, 70 S.Ct. 1029, 94 L.Ed. 1380 (1950).

In the present case, the Sixth Circuit did not change the burden of asserting the privilege; on the contrary, it assumed that Selox had already established the existence of the privilege and addressed only whether plaintiffs had shown good cause under *Garner* to avoid the privilege.

V. THERE EXIST AT LEAST TWO INDEPENDENT GROUNDS SUPPORTING THE SIXTH CIRCUIT'S DECISION

The Sixth Circuit's decision to affirm the district court's order is equally supportable under principles not raised in Selox's petition. First, Selox failed in the trial court to establish the factual elements necessary for the attorney-client privilege to apply. Second (although included in the preceding point), the privilege was not available because the communications involved fraudulent or criminal activity.

A.

As discussed in section IV of this brief, the party asserting the attorney-client privilege has the burden of establishing the elements necessary to make the privilege applicable to each communication for which protection is sought. Selox made no such showing; rather, it simply instructed Mr. Richardson to refuse to answer the questions and to refuse to produce the requested documents. Selox made no showing that the communications were not made in the presence of strangers or that the documents had not been released to persons outside of the attorney-client relationship. In one instance Mr. Richardson refused to testify about a conversation with defendant Lowe while admitting that Mr. Lowe was not seeking legal advice.

Nor did Selox establish that the communications related to its attorney-client relationship rather than defendant White's personal attorney-client relationship. Defendant White did not appeal the district court's order, and therefore only Selox's privilege was at issue before the Sixth Circuit. The magistrate judge

who considered the record, briefs and arguments on plaintiffs' motion to compel found that because defendant White's actions and dealings with the attorneys were "so inextricably intertwined," it was "impossible" for the magistrate judge to "distinguish conversations between the defendant and his attorneys which were for personal matters and which were for corporate matters." (App. 27a)

B.

Additionally, there can be no privilege if the communication was for the purpose of committing a crime or tort. *In re Antitrust Grand Jury*, 805 F.2d 155, 162-3 (6th Cir. 1986). Even while placing the burden on plaintiffs to make a *prima facie* showing that under the facts as alleged a prudent person would have a reasonable basis to suspect the perpetration of a crime or fraud, the magistrate judge correctly found that defendant White's activity could lead a prudent person to suspect the perpetration of a fraud. (App. 26a)

Plaintiffs' claims are premised on a fraudulent scheme led by defendant White to squeeze out the minority shareholders. The scheme included Selox's discontinuance of dividends supported by false claims of poor cash flow or actual cash shortages caused by defendant White's self-dealing transactions; defendant White's and Selox's purchase of minority shares at prices far less than they knew outsiders were willing to pay; and the extraction long after the fact of purported releases in connection with a number of these purchases. Mr. Richardson's law firm drafted the purchase documents as well as the purported releases.

Plaintiffs' motion to compel alleged that Mr. Richardson assisted and advised defendant White in these matters. (App. 36-7a) Despite this assertion, Selox failed to offer any proof in the trial court to the effect that the communications did not involve the commission of a crime or fraud. Instead, Selox rested on a blanket and unsupported assertion of the privilege. For these reasons, the privilege was never shown to attach in the first instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 20, 1992

(3)

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No. 92-708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SELOX INC., A Corporation,

Petitioner,

vs.

THOMAS A. J. FAUSEK, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the Sixth Circuit

REPLY OF PETITIONER TO BRIEF
IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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SELOX, INC., A Corporation,

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Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner Selox, Inc. ("Selox")[1] submits the following points in reply to arguments first raised by the Respondents in the Brief in Opposition.

1. Petitioner Has Not Waived Its Attorney-Client Privilege.

Respondents argue that a recent production of documents listed on deposition Ex. 456 (App. 42a) by former counsel to defendant Robert E. White is a voluntary waiver by Selox of its privilege claims mooting the issues in this case. Their argument misstates the facts regarding the production and is legally wrong.

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[1] Pursuant to Rule 29.1 of this Court, reference is made to page ii of the Petition for Writ of Certiorari for Petitioner's list of corporate affiliates.

First, the motion to compel at issue also sought production of the documents listed on Ex. 456 (See App 36a, 37a). Only after the Magistrate's Order compelling discovery had been affirmed by the Sixth Circuit did Miller & Martin relinquish the documents on Ex. 456 on the advice of their attorneys after respondents' counsel had demanded them pursuant to the judgment of the Sixth Circuit (App. 15a) and the outstanding subpoena (App. 30a).[2]

Under these facts, the recent production of documents on Ex. 456 was not undertaken by Selox and in no event was voluntary. Therefore, the cases cited by Respondents (Brief at 9) are inapposite. *In re Subpoena Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984) held that when defendants in a civil action had voluntarily supplied certain documents to the Securities and Exchange Commission and to a grand jury in an effort to avert an investigation, they could not later prevent production of those documents by their counsel on the basis that their prior voluntary disclosure was a "limited" waiver of the privilege. 738 F.2d at 1370.

In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989), also cited by Respondents, involved a grand jury subpoena for 6 documents resisted by a company on ac-

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[2] Selox also notes that neither the motion nor the Magistrate's Order (App. 19a) supports Respondents' contention (Brief at 9) that the privileged documents on Ex. 456 covered every privileged area of questioning the Magistrate has compelled attorney Richardson to answer. Further, many of the documents on Ex. 456 were designated as withheld from production by defendant White from his files as not responsive to the request for production made when Selox was not a party. They were simply not Selox's documents to produce or withhold at any time.

count of attorney-client privilege. The Government sought to overcome the corporation's attorney-client privilege claim on the basis of an inadvertent disclosure of one document. The case does not, as Respondents suggest, support broad waiver of all privilege claims from the inadvertent waiver as to one document, much less apply to an involuntary, compelled production.

Respondents may not bootstrap an argument from the two cases they cite that disclosure of certain of White's documents by his former counsel pursuant to subpoena and court order constitutes a waiver by Selox of its privilege claims. The law is to the contrary. In *In re Grand Jury Proceedings, Vargas*, 723 F.2d 1461, 1466 (1983) appeal after remand 727 F.2d 941, *cert. denied*, 469 U.S. 819, 105 S.Ct. 90, 83 L.Ed.2d 37 (1984), the Tenth Circuit noted that "because an attorney cannot waive the client's consent, *Republic Gear Co. v. Borg Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967), production of privileged documents by an attorney under court order does not necessarily constitute a waiver of the privilege. *Transamerica Computer Co. v. International Business Machines Corp.*, 573 F.2d 646, 651 (9th Cir. 1978) [("party does not waive the attorney-client privilege for documents he is *compelled* to produce.")]; *Teachers Insurance and Annuity Assoc. v. Shamrock Broadcasting Co.*, 521 F.Supp. 638, 641 (S.D.N.Y. 1981); cf. *United States v. Fusaro*, 708 F.2d 17, 25 n. 3 (1st Cir. 1983)." 723 F.2d at 1466. (footnote omitted).

In *Ward v. Succession of Freeman*, 854 F.2d 780, 788 (5th Cir. 1988), the court held that defendants did not waive their claims of privilege on appeal by making use at trial of privileged communications

which the district court had compelled them to disclose. *See also Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989) (compelled disclosure of privileged work product in one case over objection and reasonable steps to protect privilege does not waive privilege before another court.)

2. The Issues Raised By Petitioner Are Not Moot.

The compelled and involuntary production of documents discussed above does not render Selox's claims moot because the deposition has not been resumed and trial has not even been scheduled. Even if the deposition goes forward pending a ruling by this Court, if Selox prevails on its appeal, the lower courts could provide relief by upholding the privilege claims for the testimony, requiring the return of privileged documents, and prohibiting the use of the privileged deposition testimony at trial. *See Mills v. Green*, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895). This Court recently reaffirmed this principle in *Church of Scientology of California v. United States*, ___ U.S. ___, 61 U.S.L.W. 4003 (No. 91-946 11-16-92), holding that a third party's compliance with an IRS summons order for tapes in its custody did not moot the appeal of the Church contesting the legality of the summons order. The availability of a partial remedy was deemed sufficient to prevent the case from being moot.

3. Respondents' Suggestion Of Independent Grounds Supporting The Sixth Circuit Decision Is Spurious.

Respondents suggest two "independent" grounds for upholding the decision below. Neither ground was mentioned in the Sixth Circuit's opinion, and Respondents' reliance on them is unsupported by any citation to the record below.

First, Respondents suggest that Selox failed to demonstrate the applicability of the attorney-client privilege as to each of the questions Richardson refused to answer (Brief at 20). Suffice it to say that when this matter was argued before the Magistrate, Selox's counsel urged without contradiction by Respondents' counsel that there was no question on the record made in the deposition that privilege was asserted by Richardson because it existed in that the communications at issue were with corporate officers, with no one else present. The Magistrate concurred in this assertion. (See pages 81-82 of the Transcript of the argument before the Magistrate attached to this Reply Brief A1-A2.).[3]

Respondents are equally in error in urging that the crime-fraud exception to privilege supports the decision of the Sixth Circuit, citing *In re Antitrust Grand Jury*, 805 F.2d 155, 162-3 (6th Cir. 1986). (Brief at 21). In fact, the Magistrate cited this case in his Order but found that "the facts of *In re Antitrust* are not analogous to those of this matter," (App. 26a), relying on the case only for its analysis of the standard required to overcome the privilege. (*Id.*). Respondents did not appeal this finding to the Sixth Circuit, which also did not rely on the crime-fraud exception. The record adduced in support of the motion to compel

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[3] Respondents' representation that Selox instructed Richardson not to answer or to produce documents in blanket fashion is false. The deposition was defended by White's counsel. Richardson refused to answer specific questions, and in each case carefully stated whether he was claiming White's privilege, Selox's privilege, or both. Respondents append nothing from the actual deposition to their Brief because the transcript belies their assertion.

led the Magistrate to state that "the undersigned is mindful of the fact that Selox is not a defendant in this action and no wrongdoing on the part of the corporation has been alleged." (App. 27a). There is no basis for the suggestion that the Magistrate's Order against Selox's claim of privilege, and hence the Sixth Circuit decision, are supportable under the crime-fraud exception.

4. Respondents' Statement Of The Case Underscores The Absence Of Any Detailed Findings Of Fact Which Would Support The Magistrate's Decision.

Respondents' statement of the case contains many serious allegations, most of which are enlivened with the spice of repeated charges of fraud. Selox cannot respond to these charges within the space permitted. Suffice it to say, however, that the charges are untied to the record, inherently contradictory and vigorously disputed by Selox. Indeed, the Magistrate explicitly noted that Selox was not charged with any wrongdoing. (App. 27a).

The important point to be made about the Respondents' allegations is they have no bearing on the question of whether the writ of *certiorari* should or should not be granted. If anything, the Respondents' inability to tie the charges to the record underscores the absence of any detailed findings of fact to support the Magistrate's Order. The petition for a writ of *certiorari* should be granted so that this Court can provide appropriate guidance to the lower courts as to the minimal procedural requirements which must be met before an order may issue breaching an attorney-client privilege under *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied* 401 U.S. 974, 28 L.Ed.2d 232, 91 S.Ct. 1191 (1971).

5. Respondents' Efforts To Misstate Tennessee Law Underscore The Absence Of Any Fiduciary Duty Upon Which Justify The Application of Garner To Private Litigation Not Involving Matters Of General Corporate Governance.

Respondents' arguments regarding Tennessee law do not address *Shaw v. Cole*, 132 Tenn. 210, 177 S.W. 479 (1915) or the Sixth Circuit's selective editing of *Johns v. Caldwell*, 601 S.W.2d 37 (Tenn. App. 1980). Instead, Respondents simply attempt to obscure *Vance v. Schulder*, 547 S.W.2d 927 (Tenn. 1977), which the Sixth Circuit had previously chosen to ignore despite Selox's citation of the case as the concluding leg of a trilogy.

Respondents' efforts to misstate *Vance* are patently deficient for two reasons. First, the issue in *Vance* was whether plaintiff's claim for having been induced to sell his stock at too low a price could be predicated upon the breach of fiduciary duties as opposed to fraud. The Tennessee Supreme Court concluded that it could not. Secondly, Respondents fail to address or give meaning to the Tennessee Supreme Court's footnote in *Vance* indicating that the harshness of the common law rule has been ameliorated by statutory disclosure requirements.

Having failed to distinguish *Vance* in any meaningful way, Respondents tacitly concede the point by arguing that the fraud alleged in this case is somehow different because they have chosen to append a "squeeze-out" epithet to the fraud charge (Brief at 16). Respondents do not claim, however, that any of them were involuntarily parted from their shares by way of a merger, share exchange or corporate dissolution. More importantly, Respondents have cited

no Tennessee authority which defines or recognizes a separate and distinct cause of action for "fraudulent squeeze-out" as opposed to simple "fraud."

The issue related to the breach of Selox's attorney-client privilege was whether Selox owed Respondents any fiduciary obligations with respect to the purchase and sale of their stock in the company. Tennessee has plainly answered this question in the negative. This law applies with equal force to Selox's officers and directors. Even if it did not, however, the breach of any fiduciary duties by White as an officer, director or majority shareholder of Selox would not be chargeable to the corporation. Cf. *Howing v. Nationwide Corp.*, 927 F.2d 263, 267 (6th Cir. 1991); *Radol v. Thomas*, 772 F.2d 244, 258 (6th Cir. 1985), *cert. denied* 477 U.S. 903, 106 S.Ct. 3272, 91 L.Ed.2d 562 (1986).

Conclusion

The writ of *certiorari* should be granted.

Respectfully submitted,

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Dated: December 8, 1992

APPENDIX

* * * *

THE COURT: ALL RIGHT. NOW, DO YOU INSIST THAT THE—IS YOURS AN ACADEMIC OBJECTION OR, OR DO YOU INSIST THAT THOSE QUESTIONS WOULD REQUIRE AN ANSWER THAT WOULD VIOLATE THE SELOX PRIVILEGE?

MR. LANDER: WELL, FIRST OF ALL, THAT WAS MY NEXT POINT I WAS GOING TO MAKE IS THAT SELOX ASSERTS TODAY RESPECTFULLY, AND WE'VE NEVER SEEN A CASE CITED FOR THE PROPOSITION THAT THE CLIENT HAS TO DO MORE THAN ASSERT THAT CONFIDENCE AS BEING INQUIRED INTO IN ORDER TO RESERVE THE CONFIDENCE. WE DO NOT HAVE TO SHOW ADDITIONAL PREJUDICE TO OUR CLIENT BEYOND THE INTRUSION ITSELF INTO THE ATTORNEY-CLIENT PRIVILEGE, WHICH MY CLIENT IN ITS PRESENT MANAGEMENT—

THE COURT: I THINK THAT'S RIGHT; AND ALL YOU GOT TO DO IS SAY IT, AND THEN HE'S GOT TO GET AROUND IT SOME WAY.

MR. LANDER: AND I DON'T THINK THERE WAS ANY QUESTION ON THE RECORD THAT WAS MADE IN THE DEPOSITION, YOUR HONOR, THAT THE PRIVILEGE, UNLESS IT WAS TAKEN AWAY EITHER UNDER THE GARNER THEORY OR UNDER THIS OTHER THEORY OF CONFLICT, THE PRIVILEGE WAS ASSERTED BECAUSE IT EXISTED. THESE WERE COMMUNICATIONS THAT I'M CONCERNED WITH BETWEEN EITHER ROBERT WHITE AS AN EXECUTIVE OF SELOX WITH HIS LAWYER, NO ONE ELSE PRESENT, OR MR. TOM LOWE.

THE COURT: I THINK THAT'S RIGHT. I THINK ALL YOU GOT TO DO IS SAY IT, BUT I'M ASKING YOU NOW AS A PRACTICAL MATTER DO YOU THINK THAT ANY OF THOSE QUESTIONS ASK FOR BREACH OF THE SELOX PRIVILEGE?

MR. LANDER: LET ME BE VERY PRECISE HOW I ANSWER THIS.

THE COURT: ALL RIGHT.

MR. LANDER: MR. RICHARDSON—AND I'M GOING TO CITE TO THE COURT IN A MINUTE—MR. RICHARDSSON TESTIFIED OR STATED IN HIS DEPOSITION THAT CERTAIN OF THE QUESTIONS ASKED HIM WOULD CAUSE HIM TO BREACH A CONFIDENCE, A CONFIDENCE COMMUNICATION THAT BELONGS TO SELOX; THAT HE THOUGHT THAT THE QUESTIONS THAT HE WAS BEING ASKED ABOUT INVOLVED A COMMUNICATION TO HIM BY A CORPORATE OFFICER OF SELOX INVOLVING SELOX'S LEGAL AFFAIRS; SO, SO, FIRST OF ALL, I MUST SAY THAT MR. RICHARDSON SAID THAT IT DID.

NOW, I WILL NOT—IN ALL CANDOR, I WILL TELL THE COURT I HAVE ALSO INTERVIEWED MR. RICHARDSON; AND I, I DON'T WANT TO SAY ANYTHING ABOUT WHETHER OR NOT I HAVE PERSONAL KNOWLEDGE OF WHAT THE ANSWERS WOULD BE.

THE COURT: ALL RIGHT.

MR. LANDER: BUT I WILL ASSERT THAT IT'S MORE THAN AN ACADEMIC QUESTION, IF WE NEED MORE. I THINK WE HAVE THE RIGHT TO ASSERT IT; BUT BEFORE I FORGET TO DO IT—

THE COURT: OF COURSE, THE GUY WAS A CHIEF EXECUTIVE OFFICER OF SELOX AT THE TIME HE WAS DOING ALL.

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